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No.

IN THE

Supreme Court of the United States

October Term, 1985

JEFFREY R. MACDONALD,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Is the integrity of the federal judiciary undermined where the prosecution and trial court withheld information prior to trial which would have revealed the existence of a familial relationship between the judge and a prosecuting attorney previously responsible for that case, and, when that relationship and role is discovered by petitioner after trial, the judge insists upon ruling upon the recusal motion himself rather than ordering a hearing by another court?

II. Did the Court of Appeals ignore the decision of this Court in *Maine v. Moulton* in upholding the lower court's decision that it was constitutionally permissible for a government investigative agent, acting under the guise of being an impartial psychiatrist, to examine petitioner during trial without counsel, resulting in the exclusion of petitioner's psychiatric defense?

III. Did the Court of Appeals err in refusing relief where petitioner (1) demonstrated that the government withheld, suppressed, and even destroyed and lost potentially exculpatory evidence, and (2) also presented substantial after-discovered evidence, any combination of which could have resulted in a different jury verdict?

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Opinion Below.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 779 F. 2d 962 (4th Cir. 1985) and is reproduced beginning at page 1a of the Appendix to this Petition (App. A, pp. A-1).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 17, 1985, and a timely Petition for Rehearing and Suggestion for Rehearing In Banc were denied

on January 27, 1986 (A. A-10). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1)(1976).

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. §144 (1949) provides:

Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.
(As amended May 24, 1949, c. 139, §65, 63 Stat. 99.)

28 U.S.C. §455 (1974) provides in its applicable sections:

Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be

substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee and guardian;

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any

ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(As amended Dec. 5, 1974, Pub. L. 93-512, §1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, Title II, §214(a), (b), 92 Stat. 2661.)

STATEMENT OF THE CASE

A. Introduction

Beginning in the damp early morning hours of February 17, 1970 at Fort Bragg, North Carolina, with the brutal murders of Petitioner's pregnant wife and two young daughters, the case of *United States v. MacDonald* has become one of the most controversial and litigated criminal cases in the history of the federal judicial system.

Dr. Jeffrey MacDonald, Petitioner herein, schooled at Princeton University, and Northwestern Medical School, and was serving as a surgeon in the Green Berets of the United States Army on that fateful night.

When interviewed before and after rescuscitation while being treated for wounds he himself had sustained, MacDonald claimed that a group of assailants had entered his home, murdered his family, and assaulted him.

Members of the United States Army Criminal Investigation Division assigned to investigate the case immediately focused their investigation upon Captain MacDonald as their only suspect. Despite the existence of witnesses who had seen persons matching MacDonald's descriptions of the killers near the scene of the crime at approximately the same time the crimes occured, these leads were never fully investigated.

In April of 1970, formal charges were instituted by the military authorities and, after the most extensive pretrial hearing in the history of the Army, the Hearing Officer concluded that the charges against Dr. MacDonald were "untrue." All charges were dropped and MacDonald was honorably discharged from the Army in December of 1970.

Following strong criticism by the Hearing Officer of their conduct in this case, Army investigators attempted to have the United States Attorney in North Carolina reopen the matter and charge MacDonald under Federal

Law. Despite strong recommendations for indictment by Jimmie C. Proctor, the assistant United States Attorney assigned to the case, the United States Attorney refused to prosecute.

This matter was subsequently referred to the Justice Department in Washington for review. After several years of reviews which concluded that there was insufficient evidence to bring Petitioner to trial, Victor Woerhide, the assistant assigned to the case, eventually succeeded in having a grand jury empaneled in 1974. In January 1975 MacDonald was indicted and the case was assigned to the Hon. Franklin T. Dupree. Motions to dismiss the indictments on speedy trial grounds were filed and denied. The Fourth Circuit Court of Appeals overturned Judge Dupree's order and the government appealed to this Court.

This Court, for procedural reasons, reversed the Fourth Circuit's initial holding that MacDonald was denied a speedy trial, *United States v. MacDonald*, 435 U.S. 850 (1978), reversing 531 F.2d. 196 (4th Cir. 1976).

Despite dozens of requests for pre-trial discovery and inspection, the lower court permitted the government to withhold from the accused tens of thousands of documents contained in their files. The government's refusals to provide discovery necessitated an extraordinary pre-trial appeal to the Fourth Circuit which finally was resolved with the government agreeing to furnish some discovery.

This case went to trial in 1979 before Judge Dupree and Petitioner was convicted of three counts of murder.

Upon appeal, MacDonald claimed, among other reasons, that he was denied a fair trial in that the lower court had refused to permit expert psychiatric testimony on his behalf; had refused to permit him to fully explore the confessions of Helena Stoeckley (who had admitted on several occasions that she was present with the group of persons who did commit the crimes); and that the

"scientific" circumstantial case presented by the government was fatally flawed.

After the trial, this Court reversed a second Fourth Circuit holding that MacDonald had been denied a speedy trial.[1]

B. Facts Pertinent to this Appeal

Following MacDonald's conviction, he attempted to obtain documents contained in the government's investigative files which had been withheld prior to trial. Numerous requests were made employing the Freedom of Information Act and eventually a small amount of documents began to be released.

In 1983, petitioner obtained documents which revealed that the government and lower court had withheld documents and information which would have revealed that Jimmie C. Proctor, the assistant U.S. Attorney who had been pressing his superiors for MacDonald's indictment in 1970, had been the son-in-law of Judge Dupree.

These documents further revealed that the government had withheld from the defense the information that the psychiatrist who had examined MacDonald during the trial, (Dr. Brussel) had been acting as an investigative criminologist for the government since 1971, and had concluded that petitioner was guilty *eight years before the trial.*

Other documents revealed the existence of several items of critical physical evidence which had been lost or destroyed by the government and, more ominously, reports concerning them had been withheld from the defense.

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1. 456 U.S. 1 (1982) reversing 632 F.2d 258 (4th Cir.) rehearing denied by an equally divided court, 635 F.2d 1115 (4th Cir. 1980) (in banc.)

In addition, F.O.I.A. materials showed that the Government had in their files numerous reports of law enforcement officials that from 1969 to 1971 Helena Stoeckley had been an "outstanding" reliable informant during the time she had admitted being present with others who had murdered Petitioner's family.

After conviction, an independent investigation was undertaken by investigators who were former law FBI agents and police detectives. This investigation turned up at least 35 witnesses who had information about the group described by MacDonald as the killers of his family.

Petitioner filed motions for relief under 28 U.S.C. §2255, a motion for new trial under Rule 33 F.R.Cr.P., and a motion under 28 U.S.C. §455 to have the trial judge recuse himself.

After the denial of the Recusal motion by Judge Dupree, Jimmie C. Proctor made statements to their home town newspaper further expounding upon his role in this case and a motion to reconsider the recusal motion was filed and denied by Judge Dupree. All motions were denied and a timely appeal was filed with the United States Court of Appeals for the Fourth Circuit. That appeal was denied on December 17, 1985 and the Motion for Reconsideration denied on January 27, 1986.

Reasons for Granting the Writ

1. The Integrity of the Federal Judiciary is Undermined Where the Prosecution and Trial Court Withhold Information, Prior to Trial, Which Would Have Revealed the Existence of a Familial Relationship Between the Judge and Prosecuting Attorney Previously Responsible for That Case, and When That Relationship and the Extent of Participation is Discovered After Trial, and a Recusal Motion is Filed, the Judge Insists Upon Ruling Upon the Recusal Motion Himself Rather Than Ordering a Hearing by Another Court.

The rule that a judge whose impartiality has been challenged may not decide the merits of a motion that he recuse himself and that, if he nevertheless does decide the motion, he exceeds his jurisdiction, has been codified in 28 U.S.C. §144 and §455 and enforced by this Court. See *Offutt v. United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133, (1954); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Berger v. United States*, 255 U.S. 22, (1921); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harvard L. Rev. 1435 (1966).

The decision of the Court of Appeals in the instant case completely ignores both the Laws of the United States and the decisions of this Court.

In the case at bar, not only were the facts concerning the familial relationships of the trial court to a prosecuting attorney once responsible for this proceeding withheld from Petitioner prior to trial, but, once discovered in prosecution files by F.O.I.A. requests years later, the trial judge insisted on deciding the issue himself.[2]

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2. Despite the issues of fact concerning Proctor's true role in this case; what knowledge the judge had received from other members of his family; direct or contingent responsibilities of the trial court for a grandchild who bore Proctor's name; his failure to provide

It is submitted that the withholding of that information before trial and the conduct of the trial court judging his own case when recusal was requested in itself raises serious questions as to the "appearance of justice" required by this Court. *In re Murchison, supra*, 349 U.S. at 136.

In considering that (1) petitioner had to fight for eight years (1975-1983) to obtain from the government files the bits and pieces with regard to the recusal and other issues contained in this appeal, (2) to this date the prosecutors still refuse to release tens of thousands of pages of information relating to this case, and, (3) the fact that Judge Dupree severly restricted pre-trial discovery by Petitioner,[3] an even more sinister aspect is added to this case.

The few documents obtained to date clearly show that from virtually the beginning of the case in 1970, Jimmie C. Proctor, an assistant United States Attorney from Fuquay-Varina, North Carolina was assigned by his office to this matter. Even during the army hearings he

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full disclosure on the record prior to trial of these relationships; the credibility of Proctor with regard to his initial affidavit and statements to the press following the denial of the recusal motion (See footnote 5); also the question of the credibility of the trial court itself inferring that he had no knowledge of the role of his son-in-law in the most famous case of both of their careers.

It is almost inconceivable that a member of this Court would not recuse himself or herself under similar circumstances without the need of a recusal motion. At least a member of this Court would give notice of the facts which might be the basis for recusal and not decide the matter himself or herself if such a motion was filed.

3. Judge Dupree's refusal to order the government to provide a list of names and addresses of witnesses necessitated an appeal to the Fourth Circuit Court of Appeals. The prosecution's refusal to comply with 29 written requests to examine physical evidence resulted in defense experts only having days before trial to examine evidence in the possession of the government for nine years. Judge Dupree's refusal to allow the defense to see a 13 volume prosecution report on this case before trial in all likelihood is the reason for this appeal.

took an active role in representing government witnesses and working with army prosecutors. At that time he was married to the daughter of Franklin T. Dupree another attorney residing in Fuquay-Varina, and the father of the Dupree's grandchild.

After the charges by the Army against MacDonald were dropped, Proctor immediately began taking steps to present the case to a federal grand jury. He requested the FBI to "eliminate any possibility" that Helena Stoeckley be a possible suspect in the case and that other witnesses be "interviewed to establish an alibi" for Stoeckley. (letter dated November 2, 1970).

Shortly thereafter Proctor wrote to Staff Judge Advocate requesting preservation of all evidence so that "in case of new developments this office will be in a position to try the defendant." (letter dated November 16, 1970).

In another document obtained by MacDonald in 1983, a detailed report of a meeting of CID investigators and Proctor reveals Proctor conspired with the agents to try to force the United States Attorney to cooperate with them and offered to secretly turn over to them Justice Department materials which he had assembled "anticipating trying MacDonald." According to this report, Proctor offered to do so illegally if the United States Attorney refused their request. This document related that Proctor ". . . would have been the attorney who would have tried the MacDonald case."

This report further stated that contrary to the findings of the hearing officer who criticised the investigators in the case, Proctor ". . . felt that the CID did an outstanding job," and was pressing for the arrest of MacDonald's lawyers after they had been assaulted by CID agents. (Report of telephone conversation between CID agents on December 31, 1970.)

None of the documentation prepared by Proctor "in anticipation of trying MacDonald" has ever been turned over to the defense in this case.

Franklin T. Dupree was appointed to the United States District Court approximately two months before Proctor resigned as an assistant United States Attorney in February of 1971. While Proctor was divorced from Judge Dupree's daughter on July 27, 1972, he has remained responsible for the support of the trial court's grandchild throughout the pendency of this case.

Judge Dupree was assigned to this case in 1975 and was called upon by the government to make rulings which effectively foreclosed the defense from discovery prompting an extraordinary appeal to the Court of Appeals. This appeal of Judge Dupree's refusal to grant discovery finally resulted in the government turning over limited information to the defense. Thus, the information concerning Proctor's role in this case and relationship to the court was intentionally withheld from the defense by the prosecutors with Judge Dupree's tacit approval.

The finding by the Court of Appeals that the divorce of Proctor from Judge Dupree's daughter "left no vestige of the taint requiring the trial court to disqualify himself at the time of trial in 1979 or at the time the post convictions came on for a hearing in 1984," is a superficially incorrect interpretation of a serious challenge to the integrity of our federal judiciary and cannot be permitted to stand for several reasons.

First, the withholding of information as to the trial court's relationships (now former father-in-law and grandfather to Proctor's and his daughter's child) in 1975 when Judge Dupree was assigned to the case, taints all subsequent rulings by him. This was not a case where a relative of the trial judge happened to be a member of a law firm involved in a pending case, where that relative had nothing to do with the case. Even in that instance, our courts have suggested even such a tenuous tie might cause the "appearance of partiality" See *SCA Services v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) *Rice v. McKenzie*, 581 F.3d 1114 (4th Cir. 1978;

Potashnick v. Port City Construction Co. 609 F.2d 1101, 1112 (5th Cir. 1980).

Secondly, the defense of this case is based in large measure upon the defense that the government throughout this case has at times both negligently and willfully failed to pursue the real killers of his family, including Helena Stoeckley — not just that the Petitioner is innocent. Therefore, if MacDonald's claim was upheld, those participating in this miscarriage of justice — including the father of Judge Dupree's grandchild, Jimmie C. Procter — would be responsible for not only accusing an innocent man, but allowing vicious killers to walk free.

Thirdly, as a result of Judge Dupree's denial of discovery, the defense was foreclosed from presenting the admissions and confessions of Helena Stoeckley in a convoluted interpretation[4] of Fed. R. Evid. Rule 804(b)(3) in which he found that at the time of trial Helena Stoeckley was "a pathetic figure" whose statements were inherently untrustworthy, *United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979).

Fourthly, the refusal of the trial court to order a full hearing before another judge on the recusal issue when it was raised not only flies directly in the fact of the clear wording and intent of 28 U.S.C. §144, but it also shows a conscious attempt to prevent a full and impartial tribunal from probing all of the facts concerning the recusal issue, including the credibility of the trial court. This conduct, in itself, raises serious questions as to the "appearance of impropriety" of the trial court.

Fifthly, compounding this questionable refusal is the fact that, after Judge Dupree denied the recusal motion and was considering the other post-trial requests for relief, Proctor was quoted extensively in their

4. For a detailed criticism of this ruling, *Note, The corroboration requirement of Federal Rule of Evidence 804(b)(3), United States v. MacDonald: How Things Should Not Work*, 131 U. of Pa. L.Rev. 999 (1983).

home-town newspaper expounding upon his role [5] in the case in direct contravention to the government's claim and affidavits that he played a minimal role in this matter.

Sixthly, the failure to have an independent tribunal placed Judge Dupree in the unenviable, but, to him, perfectly acceptable position, of ruling upon the recusal motions and deciding on the credibility of himself and the father of his grandchild.

The decision of the Court of Appeals ignores the fact that our federal practice is based upon both Statutes 28 U.S.C. §144 and §455 which embody the common law

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5. The quotations hereunder are from *The Independent*, Fuquay-Varina, North Carolina, November 28, 1984, during the period Judge Dupree was considering the motions upon which this appeal is based.

"Proctor was deeply involved with the investigation of the MacDonald case from the beginning. As assistant U.S. Attorney in the eastern division of North Carolina and chief of the criminal division, he personally supervised the Fayetteville division.

"On the day the three murders occurred at Ft. Bragg, he was in the Virgin Islands, assisting in the trial of a murder case. As soon as he returned he was briefed on the MacDonald case by FBI Agent Bob Caverly, who, on the basis of MacDonald's initial statement to him at the hospital on the night of the murders, named MacDonald as a suspect.

"On the basis of briefings by Caverly and others involved in the initial investigation Proctor said, *'We all agreed MacDonald was the one'*."

* * *

"For a time Proctor said, he was going to Washington every two or three weeks, taking new evidence. He talked to Victor Woerheide, Justice Department prosecutor, and convinced him that he had a case against MacDonald."

* * *

"Proctor said Woerheide kept saying he knew MacDonald was guilty but he continued to point out the problems with bringing the case to trial.

" *'We begged, pleaded, even threatened to resign', Proctor recalls, adding with a chuckle, 'I was young then'*."

* * *

principal that no one may be the judge of his own cause. This principal can be traced back to the famous decision of Sir Edward Coke in *Dr. Bonham's Case* 8 Co. Rep. 114a, 2 Brownl. 255 (1610). This Court, in *In Re Murchison*, supra, 349 U.S. at 136, (1954), said,

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be the judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But, to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 438, U.S. 11 (1954).

Furthermore, what the court of Appeals failed to appreciate is that the normal standards of appellate review are rendered inappropriate by the trial judge having acted in his own cause. As this Court clearly said in *Berger v. United States, supra*, in holding that once it appears that the allegations of bias and prejudice are made, the challenged judge must proceed no further:

> "[T]he reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives

chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Id.* 255 U.S. at 36.

2. THE COURT OF APPEALS IGNORED THE DECISION OF THIS COURT IN *MAINE V. MOULTON* IN UPHOLDING THE LOWER COURT'S DECISION THAT IT WAS CONSTITUTIONALLY PERMISSIBLE FOR A GOVERNMENT INVESTIGATIVE AGENT, ACTING UNDER THE GUISE OF BEING AN INDEPENDENT PSYCHIATRIST, TO EXAMINE PETITIONER DURING TRIAL, WITHOUT COUNSEL BEING PRESENT, RESULTING IN THE EXCLUSION OF PETITIONER'S PSYCHIATRIC DEFENSE BASED UPON THAT EXAMINATION.

Some of the most, if not the most, critical testimony which the Petitioner sought to introduce at trial was expert psychiatric testimony. In 1970 when the charges were originally dismissed, the Hearing Officer had relied heavily upon the fact that not only had MacDonald's psychiatric experts testified that he was not mentally capable of having committed these crimes, but also several psychiatrists designated by the prosecution had concurred in that opinion, finding MacDonald sane and normal, with no evidence of psychopathic or sociopathic tendencies.

During trial, when the defense sought to introduce this testimony, the prosecutor's objected and Judge Dupree ruled that the government should be permitted to have another psychiatrist examine MacDonald before he would decide whether to admit the defense testimony.

Unknown to MacDonald, trial counsel, and the court, the person whom the prosecutors designated to

perform this examination had been an integral part of the prosecution team since 1971 (eight years before trial) and had already concluded that MacDonald was guilty.

Dr. James A. Brussel was employed by the government as early as February, 1971 and was working with investigators as an investigating criminologist. According to the few documents obtained in 1983 under the Freedom of Information Act, Brussel was furnished investigative data and autopsy reports and served as a investigative criminologist for the government with regard to all aspects of the physical scene of the crime.

To date the government has refused to furnish any reports of scientific studies performed by Dr. Brussel, but the documents obtained after trial indicate an intricate role in assisting army investigators building a hypothetical case against MacDonald.[6]

Not only did the prosecutors withhold information concerning Brussel's true role from the defense, but the trial court never had this information in evaluating the credibility of the information supplied to him *in camera* with regard to Brussel's psychiatric examination.

This withheld information both foreclosed the defense from objecting to the propriety of Brussel examining MacDonald, and also thereafter challenging his

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6. According to reports obtained in 1983, Dr. Brussel investigated and advised the government from February 7, 1971, on the following matters:

Pathology reports, motive, hippie conduct, use of drugs, types of weapons normally used by hippies, types of blows which would be normally inflicted by hippies, style of walk of hippies, types of gloves used for dishwashing, reason why MacDonald killed his children, injuries to Mrs. MacDonald, reconstruction of the crime scene, and others.

It must be noted that to date the government has not turned over any scientific tests upon which Dr. Brussel based his opinion about these subjects, payments for these services to Dr. Brussel, or any written psychiatric reports.

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conclusions based upon his prior fixed belief in the guilt of MacDonald, his role as an investigating criminologist, and partiality to the prosecutors.

Furthermore, Brussel insisted on examining MacDonald out of the presence of counsel, thereby depriving him of the assistance of counsel at a critical stage of these proceedings. See *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964).

Following an *in camera* report of Dr. Brussel's findings, Judge Dupree ruled that he would exclude MacDonald's psychiatric testimony since it was shaping up as a "battle of the experts." *United States v. MacDonald*, 485 F.Supp.1087, 1094-99 (E.D.N.C. 1979)

The conduct of the prosecutors is so completely abhorrent to our conceptions of fairness and decency, let alone the Constitution, that it is inconceivable that in light of the recent decision of this Court in *Maine v. Moulton*, ____ U.S.____; 106 S.Ct. 477 (1985), it does not mandate at the minimum, the granting of a new trial, if not dismissal of all charges.

In *Moulton* the prosecution was able to claim that the reason they violated the accused's rights was to obtain evidence of crimes other than those charged in the original case. Although this Court rejected that excuse, there can be no such claim here.

In this case the prosecutors intentionally withheld from the defense and trial court the true role of the "impartial psychiatrist" they requested the Court to have examine petitioner. No greater damage could have been done to Petitioner's case.

It was obvious what Dr. Brussel would conclude since he had been telling the government the same thing for eight years before his examination. The only conclusions one could reach from the conduct of the prosecution in withholding evidence of Dr. Brussel's true role from the defense and court is that the prosecution knew

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in advance what he would report and did not want him disqualified.

Additionally, in order to circumvent MacDonald's Fifth Amendment rights against self-incrimination during this examination, the prosecutors did not wish to reveal Dr. Brussel's long standing bias against the accused thereby depriving the accused of an informed and reasoned choice in deciding whether to answer Dr. Brussel's questions. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

It is clear that as a result of this elaborate sham examination Petitioner was not only denied the assistance of counsel, but also the right to present one of his most important defenses. The facts in this case are in reality many times worse that those decided by this Court in *Moulton*. Not only did the prosecution herein deliberately withhold information during trial as to the true nature of it's agent, it used the fruits of this fraud to deny the accused an essential defense.

In *Maine v. Moulton* this Court Stated, " . . . the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.* at 487

This court went on to state:

> "By concealing the fact that Colson [herein Brussel] was an agent of the State, the police [herein the prosecutor] denied Moulton [herein MacDonald] the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 488.

3. The Court of Appeals Erred in Refusing Relief Where Petitioner (1) Demonstrated That the Government Withheld, Suppressed, and Even Destroyed Potentially Exculpatory Evidence, and (2) Presented Substantial After Discovered Evidence, Any Combination of Which Could Have Resulted in a Different Jury Verdict.

1. Withheld, Suppressed and Destroyed Evidence

In addition to discovering, four years after the trial, that the trial judge had been related to one of the former prosecutors in this case and that the psychiatric examination which resulted in barring Petitioner's main defense in this case was conducted by someone who had been working as an investigating criminologist for the prosecutors for eight years before trial, Petitioner received documents under the Freedom of Information Act which showed that several key items of potentially exculpatory evidence had been "lost" or "destroyed" by government investigators and that the reports containing this information had been withheld from the defense pre-trial despite more than two dozen requests, Motions to Compel, and even extraordinary pre-trial appeals.

These items included:

(a) A bloody syringe found in the MacDonald home was never made known to the defense prior to trial.

(b) The fact that bloody clothing and boots alleged to have belonged to Helena Stoeckley were turned over to the CID, and returned to a friend of Stoeckley was never revealed to the defense prior to trial.

(c) human skin found under Mrs. MacDonald's fingernail which was "lost" by the army and this loss was not made known to the defense prior to trial.

This skin could have proven the presence of an intruder and/or eliminated MacDonald as a suspect.

(d) Photographs of the letter "G" on Helena Stoeckley's wall which were similar, according to government agents, to the printing found on the wall of the MacDonald apartment, were deliberately excluded from discovery made available to the defense prior to trial,

(e) the government failed to inform the defense prior to trial that it had destroyed seven fingerprint negatives of photographs taken inside the crime scene which could have shown that strangers were in the MacDonald apartment.

In addition to these items of physical evidence, the documents obtained years after the trial clearly indicate that the prosecutors withheld from the accused and trial court numerous documents which attested to high reliability of statements made by Helena Stoeckley.[7]

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7. (a) For a period of at least a year before and after the MacDonald murders, Helena Stoeckley gave the police of Fayetteville and Nashville good information which they relied upon to make arrests and was considered a reliable informant.

(b) Stoeckley was a prime source in a special undercover assignment investigating other policemen for the Nashville police department.

(c) As a result of information supplied by Stoeckley, a Nashville police officer was forced to resign from the police force.

(d) A C.I.D. investigator said in a written report on April 29, 1971, that "Helena is still furnishing Bowlin's unit (Nashville police) with outstanding narcotics information . . ."

(e) Stoeckley was attending classes at Aquinas Jr. College in Nashville while working with the police.

(f) DURING THE TIME SHE WAS AN "OUTSTANDING" RELIABLE INFORMANT FOR THE NASHVILLE POLICE, SHE ADMITTED TO THEM "THAT SHE HAD WINESSED THE MURDERS AND KNOWS WHO COMMITTED THE MURDERS" IN THIS CASE.

These withheld documents showed clearly that from 1969 through 1971, Helena Stoeckley was an "outstanding" reliable informant for the Nashville police and that she had admitted to them "that she had witnessed the murders and knows who committed the murders," in this case.

The withheld information assumes multi-dimensional proportions in considering its potential effects on the eventual result of the trial.

This case was presented by the government as one which was built upon "scientific" circumstantial evidence. The several items which were lost or destroyed could not only have served to undermine the credibility of the methodology and thoroughness of the government witnesses, if not lost or destroyed, but also, may have pointed to the persons who MacDonald claimed had killed his family.

In addition, the withholding of the reports of these items prior to trial foreclosed the defense from obtaining witnesses who could have testified to the significance of the loss of this evidence.

Finally, the withholding of the reports which undermined the government's case, despite numerous requests for all reports concerning physical evidence, indicates a willful intent on the prosecution to deny Petitioner a fair trial.

Here MacDonald was asked at the trial where the evidence of the intruders was, and due to the withholding of evidence by the prosecution, he was unable to answer this question.

The intentional withholding of the documents concerning Helena Stoeckley also raises multi-dimensional questions of Constitutional proportions.

Helena Stoeckley had confessed to involvement in these murders on several occasions, including a taped segment from "60 Minutes" which was filed with the lower court.

At trial, the defense sought to introduce her confessions into evidence, but the prosecutors objected claiming that under Rule 804(b)(3) Helena Stoeckley was unreliable.

Had the defense and court seen the documents which showed the high reliability of Helena Stoeckley at the time she made inculpatory statements, not only would the government's objections have been meritless, but to "a reasonable probability" the outcome of this trial could have been affected.[8]

What Petitioner believes he has demonstrated herein is a clear pattern by the government to withhold information from the defense, and that pattern thus far[9] includes the intentional withholding of evidence with regard to:

1. the relationship of the trial court to a former prosecutor in this case.

2. the surreptitious use of a government investigative criminologist as a psychiatrist to deny the accused his rights under the Fifth and Sixth Amendments to the Constitution and deny him one of his major defenses.

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8. As a result of the decision of Judge Dupree, the Court of Appeals held that Stoeckley's ". . . apparent long-standing drug habits made her an inherently unreliable witness." 688 F2d 224, 233 (1982). Had this information concerning Stoeckley's reliability in 1971 been made available by the prosecution, petitioner could have shown that as a result of the delay in the prosecution of this case, he lost this key testimony thereby prejudicing his rights to a speedy trial. This information was also withheld from this Court in the prior briefs of the government.

9. The government continues to withhold tens of thousands of documents concerning their investigation in this case. In light of the small amount of documents furnished thus far and the prejudice that has been demonstrated, one can only imagine what other violations of petitioner's rights are contained in government files which are being aggressively withheld.

3. the withholding of potentially exculpatory information with regard to loss or destruction of several items of physical evidence by government investigators.

4. the withholding of information attesting to the reliability of Helena Stoeckley in a successful attempt to keep from the jury her admissions and confessions which supported the defense that she and a group of friends actually committed these murders.

This pattern of conduct exceeds by light-years the individual instances of prosecutorial misconduct found in *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); and most recently, *United States v. Bagley* ____U.S. ____; 105 S.Ct. 3375 (1985). There is no standard of law by which these violations of Petitioner's rights could be upheld. This Court, in *Bagley*, held that a new trial is to be awarded where, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different" *Id.* at 3384 (Opinion of Blackmun, J.) See also *id.* (Opinion of White, J., concurring in part and concurring in the judgment). Justice Blackmun's opinion further defined " 'a reasonable probability' as 'a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668 (1984), which also held that a "reasonable probability" standard is different and lower than a "more likely than not standard." *Id.*)

This court noted that the government's failure to respond to a specific request affirmatively misrepresents that the evidence does not exist, and that this misrepresentation may result in the defense abandoning "lines of independent investigation, defenses or trial strategies that it otherwise would have pursued." *Id.*

For that reason, Justice Blackmun said:

> "The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course the defendants and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.*

In the instant case it is clear that had Dr. Brussel not "examined" Petitioner, the jury would have heard expert psychiatric testimony that MacDonald was psychiatrically "incapable" of committing these crimes, and that he was sane and normal.

If the various blunders of the government investigators had not been withheld from the defense, serious questions as to the "scientific" nature of the prosecution's case could have been raised in the minds of the jurors — about the government's hypothetical case.

Finally, had the evidence of the reliability of Helena Stoeckley not been withheld from the defense and court, her confessions as to involvement with others in this crime would have been before the jury.

In reviewing this pattern of government suppression of evidence, this Court should view the suppressed evidence in light of the evidence adduced at trial and consider the cumulative effect of the suppressed evidence in the aggregate. *United States ex rel. Marzeno v. Gengler*, 574 F.2d 730 (3rd Cir. 1978).

If this evidence does not raise "a probability sufficient to undermine confidence in the outcome," it would be difficult to imagine evidence that would.

(2) After-Discovered Evidence

In addition to the above evidence, Petitioner presented substantial after-discovered evidence to the lower court. Gathered by highly qualified, former law enforcement officers, and corroborated by many witnesses (at least 35), this evidence detailed the existence of the

group which matched the descriptions given by MacDonald following the murders.

This evidence showed that the group was together on the night of the murders. It was seen going towards the crime scene shortly before the murders, and some of the group were seen running from the crime scene shortly after the murders. A motive for this group to have committed the murders was discovered.

Members of the group were found to have made admissions concerning their involvement in this crime within days of the murders.

Two members later admitted their guilt and two others made admissions as to some form of involvement. A forensic expert concluded, based upon scientific evidence, that Mrs. MacDonald was killed by a left-handed individual while MacDonald was right-handed. The group member alleged by witnesses to have killed Mrs. MacDonald, Gregg Mitchell, was left-handed. Mitchell's blood type was found on Mrs. MacDonald's hand, while Petitioner's was not.

Stoeckley gave away her bloodstained clothes and boots a few days after the murders, indicating both her involvement in the crime and her consciousness of guilt. As noted above, while acting in the capacity of being an "outstanding" undercover police informant, she admitted her participation in this crime on numerous occasions.

While there is division in the various Circuit Courts of Appeal upon the issue as to the standard which should be adopted in deciding whether to grant a new trial on the basis of newly discovered evidence,[10] it is submitted that under either the "possibility" standard or the "probability" rule, Petitioner has met his burden.

10. At this point there is a division among the circuits as to the standard which should be employed in considering after-discovered evidence. Detailed discussion of a similar problem can be found in *Standards for New Trial — Rule 33*, 59 ALR Fed. 657 (1979).

It is suggested that even under the "reasonable probability" rule enunciated in *Bagley*, this evidence is "sufficient to undermine confidence in the outcome."

In the instant case, there has been demonstrated wide-spread and pervasive governmental suppression of exculpatory and impeachment evidence which continues to date. Under all decisions of this Court, including *Bagley*, relief is required. When the fact that Petitioner has obtained substantial after-discovered evidence which supports his version of this horrendous crime is added to the consideration of this case, it is clear that there can be no confidence that a new trial would produce the same result.

Conclusion

While it is popular to lament the lack of finality of judgments in our courts, this case should stand as an example as to why the system remains the best in the world. Because of our protections, this accused has been able to demonstrate that due to governmental misconduct and judicial errors, he was wrongly convicted.

In light of the discovery of the appearance of impropriety on the part of the trial court along with his refusal to have another judge decide the issue according to our laws, public confidence in our judiciary must be undermined.

When added to a clear pattern of suppression and withholding of evidence by the prosecutors along with intentional violations of Petitioner's Constitutional rights, the very basis for the accusations against Dr. MacDonald, let alone the fairness of his trial, come into question.

Supplementing these questions is substantial after-discovered evidence which undermines the government's case.

In addition to the combination of the above factors is that, absent the malicious conduct of the government herein, both the psychiatric testimony that Dr. MacDonald was "incapable" of commiting these crimes and confessions by Helena Stoeckley could have been heard by the jury.

By any objective view Dr. MacDonald is entitled to relief by this Court.

The cause for the necessity of this relief is not the accused, but the misconduct of the government and trial court in denying him a fair trial in the first instance.

Respectfully Submitted,

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Brian O'Neill
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6208

United States of America,

Appellee,

versus

Jeffrey R. MacDonald,

Appellant,

National Association of
Criminal Defense Lawyers,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Franklin T. Dupree, Senior District Judge (C/A 84-41-CIV-3)

Argued October 7, 1985 Decided December 17, 1985

Before RUSSELL and MURNAGHAN, *Circuit Judges*, and HAYNSWORTH, *Senior Circuit Judge*

Brian O'Neill (Myrna K. Greenberg on brief) for Appellant; Brian M. Murtagh, Special Assistant U. S. Attorney; John F. De Pue, Department of Justice (Samuel T. Currin, U. S. Attorney on brief) for Appellee; (Efraim Margolin, Chairman, Amicus Curiae Committee, National Association of Criminal Defense Lawyers on brief) for Amicus Curiae.

HAYNSWORTH, *Senior Circuit Judge:*

Jeffrey MacDonald was convicted of the gruesome murder of his wife and two young daughters, and his convictions were affirmed on appeal. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982). Subsequently

he filed two motions for relief under 28 U.S.C. §2255, one motion for a new trial under Rule 33 F.R.Cr.P., and a fourth motion under 28 U.S.C. §455 to have the trial judge recuse himself. All four motions were denied.

We find no merit in this appeal, and affirm.

I.

The attempt to disqualify the trial judge was based upon the judge's relationship with Jimmy Proctor, who, at the time of the judge's appointment, was an assistant United States Attorney in the Eastern District of North Carolina and married to the judge's daughter. In apparent recognition that he should not be practicing in his father-in-law's courtroom, Proctor resigned as assistant United States Attorney in February 1971, approximately two months after the judge's appointment. At that time the MacDonald case was in the investigative stage, and Proctor had made statements indicating a belief that MacDonald should be indicted and prosecuted.

Proctor was divorced from the trial judge's daughter on July 27, 1972.

MacDonald was not indicted until January 1975, and trial before Judge Dupree did not commence until July 1979, more than eight years after Proctor's resignation as assistant United States Attorney, and almost seven years after his divorce from the trial judge's daughter.

These circumstances present no basis for a disqualification or recusal. By the time the trial judge was called upon to make any discretionary ruling in the case, Proctor had long since ceased to be a United States Attorney and ceased to be the judge's son-in-law. The earlier relationship would have disqualified either the judge or the son-in-law, and they treated it as disqualifying the son-in-law. Termination of both branches of the disqualifying relationship, however, left no vestige of the taint requiring the trial judge to disqualify himself at the time of trial in 1979 or at the time the post conviction motions

came on for a hearing in 1984. *S.J. Groves & Sons Co. v. International Brotherhood of Teamsters*, 581 F.2d 1241 (7th Cir. 1978).

II.

It is contended that MacDonald is entitled to a new trial because of evidence discovered after his conviction. This evidence consists primarily of post trial statements by Helena Stoeckley, and one each by two of her former associate drug addicts.

MacDonald's version of the events that fatal night was that his home was invaded by three men and a woman, all drunk on drugs. It was they who had attacked him and had viciously murdered his wife and children. The female invader he described as a blonde woman wearing a floppy hat and brown boots coming almost up to her knees. Helena Stoeckley had brown hair, but she sometimes wore a blonde wig, a floppy hat and high brown boots. After hearing of Dr. MacDonald's accusations, Helena Stoeckley thought that she might have been the female he described. She disposed of the wig, the hat and the boots.

Helena Stoeckley was also heavily addicted to drugs. She was a witness at the trial where she testifed that she was so heavily intoxicated with drugs in the early morning hours of the night in question that she had no idea of what she had done or where she had been. Before trial, however, she had made statements to the effect that she had been, or might have been, in the MacDonald home. The statements contained internal suggestions that they were the product of fantasy. She stated, for instance, that she held a lighted candle for illumination but "it was not dripping wax; it was dripping blood."

At the trial, the defense sought to introduce evidence of two earlier hearsay statements. They were excluded as being untrustworthy, and this court affirmed the exercise by the trial judge of his discretion in excluding them

for lack of trustworthiness. *United States v. MacDonald*, 688 F.2d at 230-34.

Helena Stoeckley has since died, apparently as the result of drug abuse. After the trial and during her lifetime, however, she continued to make conflicting statements. Sometimes she remembered nothing about what happened that night, while, apparently depending upon who questioned her, she sometimes remembered in some gory detail being with the slayers of the MacDonald mother and children. The details she gave, however, contain many inconsistencies with MacDonald's version of what occurred and with the circumstantial evidence derived from the scene.

Evidence was proffered that Greg Mitchell, a former associate of Helena Stoeckley, has explained to friends an apparent state of depression by saying that he had been involved in some murders.

Cathy Perry Williams, a former associate of Stoeckley's and a schizophrenic, allegedly confessed that she was one of the invading murderers. She claimed to have recalled evidence of that night in some detail, but the detail varied widely from the known physical facts, from Dr. MacDonald's version of what transpired, and from Helena Stoeckley's numerous confessions. Notably, the Williams statement would have had two women among four intruders; she had gone upstairs to get to the bedrooms, and the two children were boys.

To obtain a new trial on the basis of after discovered evidence, that evidence must be admissible in a new trial. There is substantial doubt that these hearsay statements would be admissible since corroborating circumstances do not clearly indicate their trustworthiness. *See* F.R.E. 804(b)(3); *United States v. Carvalho*, 742 F.2d 146 (4th Cir. 1984). However, we need go no further than to observe that the district judge found that this melange of hearsay evidence would not produce a different result in a new trial. *United States v. Lott*,751 F.2d 717 (4th Cir. 1985). That assessment was for the

district judge. There is an evidentiary basis for the finding, and there are no extraordinary circumstances that might warrant our intervention. *See United States v. Carmichael*, 726 F.2d 158 (4th Cir. 1984).

If these hearsay statements had been before the jury, it is most unlikely that the jury would have given them any credence. The circumstantial evidence made a strong case against MacDonald and demonstrated that his story was a fabrication entirely or in substantial part. Nevertheless, when his story first came out, Helena Stoeckley had no reason to doubt his truthfulness. It is clear that she thought his description of the blonde woman with the floppy hat and brown boots fit her, and a pitiable person whose memory had been completely blocked by drugs is bound to be highly suggestible. Since she could not remember where she had been or what she had been doing, MacDonald's description of the blonde woman necessarily would cause her to wonder whether she had been in the MacDonald residence and to fantasize participation in a crime as horrible as it was senseless. And, if Helena Stoeckley had been one of four intruders, some of her friends whose memories were similarly blocked by drugs might well have had similar fantasies.

Perhaps it would have been better if evidence of Stoeckley's pretrial statements had been received, as Judge Murnaghan observed in his concurring opinion, 688 F.2d at 234-36, but the district judge could appropriately find that the post trial statements were all lacking in trustworthiness and that they did not meet the materiality requirement for a new trial.

III.

Relief under §2255 was sought on the basis of claimed suppression of exculpatory evidence. The district judge considered each claim extensively and meticulously. We think he properly rejected them.

A.

Blood of MacDonald's type was found on the door of a linen closet. Inside the closet were a number of medications and a supply of syringes and needles. When one of the Army investigators was being debriefed, he said that "a half filled syringe that contained an as yet unknown fluid was located in a hall closet which also contained some evidence of blood." The defense interprets the statement to refer to a syringe containing a bloody fluid, and suggests that production and analysis of such bloody fluid might have lent some support to the claim of an intrusion by drug addicts and corroborated Cathy Perry Williams' claim that the intruders had injected a drug in MacDonald.

The statement is more readily interpreted to refer to blood on or in the closet rather than to blood in a fluid within a syringe. There were, indeed, blood stains on the closet door, and, though there were detailed inventories of the contents of the closet, there was no other reference to a syringe containing fluid of any kind. The statement was made by one who had not been a participant in making the inventory of the contents of the closet; he purported to be repeating what someone else had told him, but, according to the other investigators who actually examined the contents of the closet, there was no such syringe.

B.

In December 1970 Cathy Perry, later Williams, stabbed the soldier with whom she had been living. After she was sent away, he and a Mrs. Garcia undertook to collect Cathy's belongings. A pair of beige boots and other items were turned over to military investigators.

The beige boots were examined for blood stains or material that might connect them to the scene of the MacDonald murders. Nothing was found, and the boots were returned.

MacDonald speculates that the beige boots belonged to Helena Stoeckley rather than to Cathy Perry, and that they would be exculpatory if they were found to have been stained with blood. It is simple speculation, however, for they did not fit the description of the brown boots mentioned by MacDonald, and examination by the CID revealed no blood stains.

C.

During an autopsy performed on the body of Mrs. MacDonald, scrapings were taken from beneath her fingernails and placed in a vial. An Army investigator reported that he saw in the vial what he believed to be a small piece of skin. Thereafter, detailed laboratory analysis was performed, and the report of the analysis contains no mention of any skin.

Either the investigator was mistaken in believing that what he had seen in the vial was a small piece of skin, or the piece of skin was lost.

Interestingly, there were scratches on Dr. MacDonald's chest, which might have been made by Mrs. MacDonald if her husband were her slayer.

D.

Helena Stoeckley had refused to be fingerprinted. Seeking her prints, an investigator was dispatched to Nashville, Tennessee to examine an apartment she had recently occupied and that was being monitored by Nashville police with her consent. He found many prints and made many photographs. Apparently with her finger, she had painted words on the walls, and the investigator photographed an upper case "G" as it appeared in such words as "Good" and "Gemini." In a handwritten note, he stated that the letter seemed to resemble the "G" in the word "Pig" that had been painted on the headboard of Mrs. MacDonald's bed. That word also had been finger painted, but there was expert opinion that it had

been done by one wearing rubber gloves, for there were no traces of ridges. Dr. MacDonald had such gloves, of course, and pieces of one were found on the bed near the headboard and in a pile of bedclothing.

Prints of the photographs made in the Nashville apartment were supplied to defense counsel before trial, but, unfortunately, the investigator's handwritten note about a possible resemblance of the "G's" did not find its way into the typed explanatory material supplied to the lawyer. It is now contended that failure to supply the handwritten observation made the photographs meaningless.

Subsequent inspection in the FBI crime laboratory produced a report that neither the "G's" on the wall of the apartment in Nashville nor the "G" on the headboard contained the "inherent individual characteristics essential to a . . . meaningful comparison." Moreover, the investigator who took the Nashville photographs opined that the "G's" in Nashville resembled "G's" he had seen in MacDonald's military notebooks as well as the "G" on the headboard.

E.

The district judge concluded that the government had not deliberately suppressed anything and had acted in complete good faith. More important, however, the district judge found that this evidence did not meet the materiality requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976). We agree, and our view is not altered by the more recent case of *United States v. Bagley*, ____U.S. ____(July 2, 1985).

IV.

MacDonald also claims that his Fifth and Sixth Amendment rights were violated when a psychiatrist examined him during trial. There had been an agreement

upon the examination, but MacDonald now claims that the psychiatrist was a "government investigator" who asked many questions about the facts and disclosed MacDonald's answers to the prosecution. There is no support for the contention except speculation, and the district court found that the psychiatrist did not depart from his properly assigned role.

V.

In much greater detail than we, the district judge considered every contention that MacDonald advanced. The care with which it was done is evident, and we may conclude this much briefer opinion with the statement that there is no basis upon which any ruling in this case by a meticulous district judge can be overturned.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6208

United States of America,

Appellee,

versus

Jeffrey R. MacDonald,

Apppellant

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court having been made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Russell and Judge Murnaghan,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

Clement F. Haynsworth, Jr.
U. S. Circuit Judge

January 27, 1986

Supreme Court, U.S.
FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1571

IN THE

Supreme Court of the United States

October Term, 1985

JEFFREY R. MACDONALD,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 75-26-CR-3

UNITED STATES OF AMERICA,

Plaintiff

v.

JEFFREY R. MACDONALD,

Defendant

ORDER

Following a seven-week trial over which I presided Jeffrey R. MacDonald was convicted by a jury on August 29, 1979 of murdering his wife and two children. Sentenced to three consecutive life sentences, MacDonald, after exhausting several appeals, filed four motions on April 5, 1984 challenging his conviction on various grounds. In one of these motions, the subject of the present order, MacDonald requests that I recuse myself from further action in the case. The motion came on for hearing on August 21, 1984 and was denied following arguments by counsel. The reasons for this ruling will now be recorded.

A full understanding of the alleged basis of the motion to recuse requires a recitation of the chronology of events in the case. During the early morning of February 17, 1970, MacDonald's wife and two children were brutally murdered in their apartment at Fort Bragg, North Carolina. MacDonald's account of what transpired that night was that the murders had been committed in a bizarre attack by four drug-crazed intruders, who were members of a cult. This allegation initially led the Army's

Criminal Investigation Division (CID) and the Federal Bureau of Investigation (FBI) to investigate Helena Stoeckley and three men, all of whom lived in the Fayetteville area. When this investigation proved fruitless and physical evidence inconsistent with this theory was discovered, attention turned to MacDonald as a possible suspect.

On April 6, 1970, the CID advised MacDonald that he was a suspect in the case and confined him to quarters. The Army formally charged him with the murder of his family on May 1, 1970. Pursuant to Article 32 of the Uniform Code of Military Justice, a formal pre-court martial investigation was conducted and hearings were held at which both sides presented evidence and questioned witnesses. One of the witnesses at the Article 32 hearing, FBI Special Agent Robert M. Caverly, was represented by my former son-in-law, Jimmie C. Proctor, an Assistant United States Attorney.[1]

At the close of the Article 32 proceedings, the investigating officer, Colonel Warren V. Rock, recommended dismissal of all charges against MacDonald. This recommendation was adopted by MacDonald's commanding officer and all charges against MacDonald were dropped on October 23, 1970. MacDonald was subsequently discharged from the Army in December of 1970.[2]

Following MacDonald's discharge from the Army, the Justice Department requested that the CID continue its investigation of the murders. The accounts of Jimmie Proctor's involvement in this second investigation vary.

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1. Proctor had been employed by the United States Attorney since May 28, 1969 but apparently had no responsibility in the *MacDonald* case prior to being assigned to represent Agent Caverly. He and my daughter were divorced on July 27, 1972 following a one-year separation.

2. MacDonald's discharge from the Army barred any further military proceedings against him. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13-23 (1955). The discharge did not, of course, preclude civilian authorities from continuing to investigate the murders.

MacDonald claims Proctor played a "forceful role" in the investigation and "vigorously and aggressively" advocated his prosecution for the murders. The government responds that Proctor merely acted in a liaison capacity in coordinating meetings between CID and FBI agents and obtaining office space for use by CID agents during their investigation. Proctor's role in the case, however characterized, was short-lived. He resigned from the United States Attorney's Office on February 28, 1971, slightly over four months after the Army dismissed charges against MacDonald. He thereafter had no connection with the case.

I was appointed to the bench on December 12, 1970 and was sworn in on January 4, 1971. Proctor's involvement in the case was unknown to me and there were no communications between us about the case. In fact, since I held hardly any criminal court during the first five years I was on the bench, I had no familiarity with the criminal docket in the Eastern District of North Carolina. During the two months he remained an Assistant United States Attorney after I came on the bench Proctor did not appear before me in any case.

Investigation of the *MacDonald* case continued in the early 1970's. Almost 700 witnesses were interviewed and a thirteen-volume report, twice supplemented, was prepared by the CID. This report ultimately led to MacDonald's indictment for the murders by a grand jury on January 24, 1975. Shortly thereafter the case was assigned to me.[3] Following a series of pre-trial motions and interlocutory appeals, trial of the case finally commenced in July of 1979. MacDonald was convicted by the jury the following month and sentenced by the court to three consecutive life imprisonments. His conviction was affirmed by the Fourth Circuit Court on Appeals. *United*

3. Although it has escaped my recollection, the docket sheets reflect that in August of 1974 when it was being presented to the grand jury counsel for both sides sought hearings before me on various motions.

States v. MacDonald, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, ____U.S. ____, 103 S.Ct.726 (1983).

From these facts, MacDonald presents four grounds for recusal: (1) my former relationship to Jimmie Proctor creates a situation in which my impartiality might reasonably be questioned; (2) I am disqualified because Proctor acted as a lawyer in the proceeding; (3) Proctor had an interest which could have been substantially affected by the outcome of the *MacDonald* case; and (4) because of my rulings at trial on the admissibility of certain out-of-court statements of Helena Stoeckly I am now biased against granting a new trial. The motion was brought pursuant to the provisions of 28 U.S.C. § 455.[4]

Prior to its amendment in 1974, Section 455 provided a subjective standard for judges to apply when deciding motions to recuse and the judge was encouraged to continue sitting in a case if the motion was only of questionable validity.[5] *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 114-15 & n.12 (7th Cir. 1977); *In Re Union Leader Corporation*, 292 F.2d 381, 388-89 (1st Cir. 1961). The 1974 amendments to 28 U.S.C. § 455 were adopted for essentially four reasons. First, the amendments harmonized the statutory provision with the more specific requirements of Canon 3 of the Code of Judicial Conduct. Second, the amendments more fully defined the situations in which a judge should recuse

4. Recusal was also sought under 28 U.S.C. § 144. Since all arguments by counsel for MacDonald were made under 28 U.S.C. § 455 and the standards for recusal on the basis of personal bias or prejudice under this section are identical to those in 28 U.S.C. § 144, *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980), the motion will be treated as if brought solely under Section 455.

5. Disqualification was mandated by the pre-1974 version of Section 455 only if the judge concluded "in his opinion" that circumstances would make it improper for him to continue to preside over the case. The same degree of latitude is not permitted in Section 455 as it now reads. The judge *must* disqualify himself in certain situations, regardless of whether he thinks he can continue to rule in the case with absolute objectivity.

himself. The third reason for adoption of the amendments was to eliminate the subjective "in the judge's opinion" test in favor of a reasonable man standard. Finally, the amendments discarded the "duty to sit" rule. *See Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); H.R.Rep. No. 93-1453, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6351-55.

Turning to the merits of MacDonald's motion, his most substantial challenge is that my former relationship to Jimmie Proctor creates a situation in which my impartiality might reasonably be questioned. A judge must disqualify himself under 28 U.S.C. § 455(a) "in any proceeding in which his impartiality might reasonably be questioned." The Fourth Circuit has paraphrased this section to require recusal if a reasonable man knowing all of the circumstances would have a reasonable basis for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

MacDonald argues that Jimmie Proctor played a "forceful role" in the case because he rejected Helena Stoeckly as a suspect and pressed the United States Attorney to investigate the possibility that MacDonald might have committed the murders. MacDonald further states that it is "particularly noteworthy that after Mr. Proctor had 'eliminated' Helena Stoeckly as a suspect, [the court] excluded all of the testimony regarding Stoeckley's admissions. . . ." From this set of circumstances, he concludes that a reasonable man might believe that even before I was assigned the case, Proctor had told me of the government's theories and evidence. This is especially likely, MacDonald argues, given my relationship to Proctor.

The government counters MacDonald's arguments by characterizing Proctor's involvement in the case as that of "liaison" between the FBI and the CID. In his affidavit, Proctor agrees that his role was that of liaison in

the case. He states that although he encouraged the efforts of the CID, he had no operational control over the investigators. Proctor does not remember ever discussing the case with me before I came on the bench and is positive that he did not do so once I was appointed. He also notes that during the period he was with the United States Attorney's Office, there was no investigation of the MacDonald murders being conducted by a grand jury, the FBI or the United States Attorney's Office. The characterization of Proctor's role as that of liaison is further supported by the affidavit of Michael Kearns, Director of the CID's investigation into the murders.

As one might expect, there are no cases directly on point to use as a guide in deciding this issue. MacDonald heavily relies upon *SCA Services, Inc. v. Morgan, supra*, and *Potashnick v. Port City Construction* Company, 609 F.2d 1101 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980), in support of his "appearance of partiality" argument. In *SCA Services*, petitioner sought recusal of Judge Robert D. Morgan on the ground that, *inter alia*, his brother was the senior partner in a firm which entered a general appearance for one of the parties in the case. The brother performed no professional duties relating to the case, but petitioner argued that the relationship alone was sufficient to raise the question of partiality. The Seventh Circuit concluded that the combination of the relationship and a confidential inquiry by the judge to his brother to determine the brother's capacity in the proceedings were sufficient to require recusal. *SCA Services*, 557 F.2d at 116.

MacDonald argues that *SCA Services* is analogous to his case since the relationship between a father-in-law and son-in-law is similar to the relationship between brothers. He apparently reads *SCA Services* to hold that the very existence of such a relationship is sufficient to justify recusal on the grounds that there is an appearance of partiality. Neither MacDonald nor the government point out, however, that the Seventh Circuit's

holding in *SCA Services* was modified less than a year later by its decision in *S.J. Groves & Sons Company v. International Brotherhood of Teamsters*, 581 F.2d 1241 (7th Cir. 1978).

In *S.J. Groves & Sons*, Judge Morgan's brother again represented a group of plaintiffs during the initial stages of a lawsuit. Three days after one of the defendants suggested that the judge's relationship to his brother was grounds for recusal, Judge Morgan's brother and his law firm withdrew from the case. Judge Morgan thereafter declined to recuse himself and later entered summary judgment in favor of the plaintiffs.

Defendants vigorously argued on appeal that *SCA Services* required recusal of Judge Morgan and that the failure of the judge to recuse himself was error. The Seventh Circuit disagreed, reasoning that the withdrawal of the brother and his law firm *S.J. Groves & Sons* distinguished this case from the situation presented in *SCA Services*. *S.J. Groves & Sons*, 581 F.2d at 1247. The court noted that:

> [b]y the time the district judge was in a position to make a ruling which could give the appearance of partial treatment to the client of his brother's firm, the [brother and his] firm had withdrawn and severed all connection with the case. Prior to withdrawal, no discretionary rulings were required of the judge. Subsequent actions of the court could give the appearance of partiality only if the withdrawal and replacement of counsel were formal rather than substantive. This was not the case.

Id. at 1248. This reasoning led the Seventh Circuit to conclude that although Judge Morgan was required to recuse himself in the *SCA Services* case, he was not required to do so under the facts of *S.J. Groves & Sons*.

The *S.J. Groves & Sons* case is more analogous to the facts of the present case than is *SCA Services*. Jimmie Proctor's actions in the case, regardless of how they are

characterized, occurred at a very early stage in the case. In fact, the only proceedings pending while Proctor was with the United States Attorney's Office were those of the CID. Furthermore, the *S.J. Groves & Sons* court placed emphasis on the fact that the district court judge in that case had not made any discretionary rulings prior to withdrawal of his brother's firm. Similarly, there were no rulings by me of any kind in the *MacDonald* case simply because the indictment was not returned until almost four years after Jimmie Proctor left the United States Attorney's Office and over two and one-half years after he had ceased to be my son-in-law. Finally, there is no suggestion, and there could not be, that Proctor's resignation from the United States Attorney's Office was formal, rather than substantive. this review of the facts suggests that the arguments against recusal in the present case are even more persuasive than they were in *S.J. Groves & Sons*.

Presented with the *S.J. Groves & Sons* case at oral argument on the motion to resuce, counsel for MacDonald conceded that the case is factually similar to the present case. He attempted to distinguish *S.J. Groves & Sons* on the grounds that there was no indication in the Seventh Circuit's decision as to the degree of involvement of the judge's brother in the case whereas Jimmie Proctor played a substantial role in the initial stages of the *MacDonald* case. The Seventh Circuit did address this point, although not in great detail, when it noted that "[h]ad there been personal and active participation the question of the effect of the firm's subsequent withdrawal would have constituted a more difficult question." The court went on to state, however, that "[i]n any event considering the timing and all the other circumstances of this particular case we believe the withdrawal was sufficiently curative."

Although the parties sharply disagree on how to characterize Proctor's involvement in this case, a review

of the arguments by each side and supporting documents lead me to conclude that regardless of the characterization of Proctor's role his involvement would not be sufficient grounds for recusal. Despite his apparent suspicion that Jeffrey MacDonald was responsible for the murders, his attempts to have the case investigated by the United States Attorney's Office were unsuccessful. Moreover, the reinvestigation of the case had nothing to do with Proctor's activities; it was in response to Colonel Rock's recommendation that Helena Stoeckley be investigated and assertions by Collette MacDonald's parents and MacDonald's Article 32 counsel, Michael Malley, that the CID had mishandled the first investigation.

I find that Proctor's role in the case was limited to representing Agent Caverly at the Article 32 hearing and assisting FBI and CID investigators in the case. The documentary evidence supports the conclusion that Proctor personally believed that MacDonald had committed the crimes, but any statements he may have made expressing this personal conviction appear to have fallen upon deaf ears. Consistent with the Seventh Circuit's approach in *S.J. Groves & Sons*, I conclude that "considering the timing and all the other circumstances of this particular case, a reasonable man would not have a reasonable basis for doubting my impartiality in the case.

MacDonald also relies upon *Potashnick v. Port City Construction Company*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), in support of his Section 455(a) argument. In this case, the trial judge heard a case tried by a former law partner with whom the judge jointly owned real estate. The judge's father was also a member of the law firm. The Fifth Circuit held that the investment relationship between the judge and his former law partner was sufficient to require recusal under Section 455(a). *Id.* at 1110-12. The relationship between the judge and his father in *Potashnick* was discussed only in the context of whether the father was

acting as a lawyer in the proceeding and had an interest that could substantially be affected by the outcome of the case warranting recusal under 28 U.S.C § 455(b)(5)(ii) and (iii). The applicability of Section 455(a) to this relationship was not discussed. Thus, although *Potashnick* had some *dicta* on the purpose of 28 U.S.C. § 455(a) which is favorable to MacDonald's interpretation of the statute, the case is not otherwise analogous, especially when considered alongside the Seventh Circuit's decision in *S.J. Groves & Sons*.

Finally, there are two common sense reasons why my relationship to Jimmie Proctor would not lead a reasonable man to question my impartiality. First, as noted earlier, neither Proctor nor I have any recollection of ever having had any conversations about the MacDonald case. Second, although I agree that the focus of attention in a motion brought under Section 455(a) is on the "appearance" of partiality and not its actual existence, the defendant has never made the claim on the record that he did not receive a fair trial. On the contrary one of his trial attorneys has on more than one occasion expressed the view that the trial was fairly conducted.

In summary, the only facts upon which MacDonald relies in support of his argument that recusal is necessary because of the appearance of partiality is that I was once related by marriage to Jimmie Proctor and that in his capacity as Assistant United States Attorney he had a role in the preliminary stages of the *MacDonald* case. Without more, I am satisfied that this evidence would be insufficient to lead a reasonable man to question my impartiality.

MacDonald's second argument in support of his motion to recuse is that recusal is required because Jimmie Proctor acted as a lawyer in the proceedings in violation of 28 U.S.C. § 455(b)(5)(ii). Parsed, this section reads:

> (b) [A judge shall] disqualify himself in the following circumstances:

* * * * *

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

* * * * *

(ii) Is acting as a lawyer in the proceeding. . . .

MacDonald claims that this subsection applies to his case because Jimmie Proctor met the relationship requirement of (b)(5) and he acted as a lawyer in the proceeding within the meaning of (b)(5)(ii).

There are two reason why MacDonald's arguments fail. First, his complaints center upon events which occurred almost fifteen years ago but the statute appears to only cover situations in which a relative is presently acting as a lawyer in a proceeding. The unambiguous wording of this section is in the present tense although some of the other sections are phrased in the past tense. *See* 28 U.S.C. § 455(b)(2) & (3). This reading is consistent with the Seventh Circuit's decision in *S.J. Groves & Sons* where the court allowed Judge Morgan to continue hearing a case despite the fact that his brother *had been* involved in the initial stages of the proceedings. If the brother had continued his representation the judge would surely have been required to recuse himself. Proctor's only participation in the case occurred several years before the indictment was returned, and it cannot fairly be said that he ever acted as a lawyer in any proceeding before my court.

A second reason for finding that this subsection does not apply to the present case is that my relationship to Jimmie Proctor ceased over twelve years ago. MacDonald apparently reads the statute to require recusal of a judge if he has ever been related to a lawyer acting in a proceeding. Were this true, the statute would require a judge to rescue himself when a lawyer to whom he was once related by marriage over forty years ago

presently brings a case in his court. It is unlikely that Congress would have intended such a result when it was primarily concerned with guarding against the chance that a present family relationship would impair a judge's ability to decide a case impartially or create the appearance of partiality. This is not the case here.

The likely reason that Section 455(b)(5)(ii) is worded in the present tense is that present relationships were intended by Congress to be automatic grounds for recusal whereas past relationships were left to be viewed in light of whether the relationship would create an appearance of impartiality under Section 455(a). Thus, assuming I was presently related to Jimmie Proctor and he was acting as a lawyer in these proceedings, recusal would unquestionably follow. Conversely, where, as here, my former relationship to Proctor and his activity in the case ended over twelve years ago, recusal would not be necessary unless these past events created an appearance of partiality. Having already determined that on these facts no such appearance is present, recusal is not required.

The third and perhaps weakest of MacDonald's arguments is that recusal is necessary because I knew that Jimmie Proctor had an interest that could have been substantially affected by the outcome of the *MacDonald* case. He relies upon 28 U.S.C. § 455(b)(5)(ii) which states:

> (b) [A judge shall] also disqualify himself in the following circumstances:
>
> * * * * *
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * * * *

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. . . .

MacDonald asserts that Jimmie Proctor had an interest in his reputation and that this interest could have been substantially affected by the outcome of the case. He further claims that my relationship to Proctor was enough to show my knowledge of this interest.

This section, like the "acting as a lawyer in the proceding" section, is phrased in the present tense. Again, Proctor is no longer involved in the case and thus does not have any interest which could be substantially affected by its outcome.

Even assuming that the section is not limited to cases presently pending before the judge, there were no communications between Proctor and myself which would have alerted me to the fact the he was actively working on the case. Furthermore, although one court has endorsed the notion that a lawyers' interest in the reputation of his law firm is an "interest" within the meaning of the statute, no court has ever held that a lawyer's personal reputation is covered by the statutory provision.[6] *See Potashnick*, 609 F.2d at 1113-14.

MacDonald attempts to analogize Proctor's association with the United States Attorney's Office to that of the lawyer's association to his law firm in *Potashnick*, but this is an unsound analogy. As fully explained by Code of Judicial Conduct Advisory Opinion No. 38, there are differences between a lawyer's role as an Assistant United States Attorney and the role he would have as a

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6. Were I to assume, for the sake of argument, that Proctor's reputation was an interest within the meaning of Section 455(b)(5)(iii), it would make little difference. Proctor's limited role in the case was such that his reputation would not have been affected one way or the other by the outcome of the case. Moreover, the United States Attorney's Office was not prosecuting the case during Proctor's brief employment, and so there was no way his reputation could be at stake.

member of a private law firm. *Code of Judicial Conduct for United States Judges*, Advisory Opinion No. 38; *see Berger v. United States*, 295 U.S. 78, 88 (1935).

MacDonald's final argument is that my evidentiary rulings during his trial concerning certain hearsay statements allegedly made by Helena Stoeckley make it impossible for me to impartially decide the present motions. The Fourth Circuit Court of Appeals has recently held that bias warranting recusal must be personal, "as distinguished from judicial, in nature." *United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984). Denial of recusal is not an abuse of discretion if the argument for recusal is based simply upon the trial judge's rulings in the case. The Fourth Circuit's decision in *Carmichael* thus forecloses the present attempt by MacDonald to require recusal on the grounds of evidentiary rulings made during his trial.

I would be remiss if I did not make one final observation pertaining to the motion to recuse and oral arguments on the motion. Motions to recuse are sensitive matters since they directly call into question the impartiality of a judge. The court was impressed by the manner in which defense counsel handled the present motion. In fact, counsel for both sides were well prepared and ably assisted the court in examining every facet of what by its nature poses a difficult decision. The hallmark of our system of justice is that all defendants are assured, insofar as humanly possible, that the judge who presides over their trial will be fair and impartial. Counsel's actions in the case were in keeping with the highest traditions of our profession and were directed towards preserving the integrity of the judicial system.

In conclusion, it appears that MacDonald's position is based upon tenuous inferences drawn from my relationship to Jimmie Proctor and the fact that at one time he was tangentially involved in the *MacDonald* case. After thoroughly reviewing all of the affidavits in the case,

the contentions of both parties, and listening (sympathetically, I might add) to MacDonald's arguments I have been obliged to conclude that the grounds asserted do not, taken individually or in combination, warrant recusal. For this reason, the motion to recuse is denied.

SO ORDERED.

F. T. DUPREE, JR.
United States District Judge

October 1, 1984.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 75-26-CR-3

UNITED STATES OF AMERICA,

Plaintiff

v

JEFFREY R. MACDONALD,

Defendant

MEMORANDUM OF DECISION

Serving three consecutive life sentences imposed by the court following his conviction by a jury in 1979 of three counts of murder, the defendant, Jeffrey R. MacDonald, filed post-trial motions on April 5, 1984 seeking either to have his convictions set aside or a new trial on the charges. The motions, one for a new trial under Rule 33, F.R.Crim.P., and two for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, came on for an evidentiary hearing on September 19-20, 1984.[1] The government vigorously contested the motions, filing seven volumes of affidavits in response. Final arguments on the motions having been heard on January 14, 1985, the court now enters its findings of fact and conclusions of law.

1. A fourth motion was also filed pursuant to 28 U.S.C. § 455 seeking my recusal from further action in the case. The motion was denied following oral arguments on August 21, 1984 and the reasons for the denial were recorded in the court's order dated October 1, 1984. MacDonald later filed a motion for reconsideration which was denied in open court preceding final arguments on his remaining post-trial motions.

The facts of the case have been previously reported, *see, e.g., United States v. MacDonald*, 456 U.S. 1, 3-6 (1982); *United States v. MacDonald*, 531 F.2d 196, 200-02 (4th Cir. 1976), *rev'd*, 435 U.S. 850 (1978), but for purposes of this decision they must be retold. In the early morning of February 17, 1970, MacDonald's pregnant wife, Colette, and his two daughters, Kristen and Kimberly, two and five years old, were clubbed and stabbed to death in their apartment at Fort Bragg, North Carolina. When military police arrived at the crime scene following a telephone call from MacDonald, they found MacDonald, a physician and Captain in the Army Medical Corps, unconscious and lying partially across his wife's body in the master bedroom. The bodies of Kristen and Kimberly MacDonald were found in their bedrooms. Although MacDonald had sustained a number of stab wounds, one of which partially collapsed a lung, he was treated at the Womack Army Hospital Emergency Room and released after a brief hospitalization.

On the morning and afternoon of the murders and in subsequent interviews, MacDonald told investigators that the murders had been committed by four drug-crazed intruders. He said that upon retiring at approximately 2:00 a.m. to 2:30 a.m., he found that his youngest daughter, Kristen, had crawled into bed with his wife and had wet his side of the bed. He picked her up and returned her to her own room and then went into the living room to lay down on the sofa where he fell asleep. Sometime later, he was awakened by his wife and oldest daughter's screams and looked up to see a woman with blonde hair wearing a floppy hat, boots and a short skirt carrying a lighted candle and chanting "acid is groovy; kill the pigs." He said that three men, two white and one black, standing near the couch then attacked him, pulling or tearing his pajama top over his head which he then used to ward off their blows. The three attackers continued to club and stab him until he lost consciousness. When he awoke on the hall steps to the

living room, MacDonald stated that he got up and went to the master bedroom where he found his wife dead. He said that he pulled a Geneva Forge knife out of her body and covered her with his pajama top and a bathmat. He then went to his children's rooms and unsuccessfully tried to revive them. After going to the bathroom to wash himself and calling the military police, he again lost consciousness.

The military police, the Army's Criminal Investigation Division (CID), the FBI and the Fayetteville, North Carolina Police Department initially accepted MacDonald's account of the murders and immediately began searching for four people fitting his descriptions. At the same time, they continued to examine the crime scene and began to discover evidence which cast doubt on MacDonald's story. Although MacDonald had said that his pajama top was torn during his struggle with the three assailants in the living room, no fibers from the pajama top were found in that room. Fibers were found, however, inside and outside the body outline of Colette MacDonald in the master bedroom and in the rooms of Kristen and Kimberly MacDonald. A piece of plastic surgeon's glove, stained with Colette MacDonald's blood, was found inside a sheet in a pile of bedding at the foot of the master bed. Moreover, although there were numerous unidentified fingerprints in the apartment, no direct evidence of the alleged intruders was found to support MacDonald's version as to what happened on the night of the murders. From this and similar evidence, investigators became convinced that MacDonald had killed his family and staged the crime scene to cover up the murders.

The Army eventually charged MacDonald with the murders and a formal pre-court martial investigation was conducted and hearings held pursuant to Article 32 of the Uniform Code of Military Justice. At the close of the

Article 32 proceedings, the investigating officer recommended that all charges against MacDonald be dismissed and that civilian authorities investigate Helena Stoeckley, a young woman resembling MacDonald's description of the female assailant, as a possible suspect.

MacDonald was subsequently discharged from the Army but investigation of the case continued into the early 1970's. Over six hundred witnesses were interviewed and a thirteen-volume report, twice supplemented, was prepared by the CID. Based upon this report and other evidence gathered by civilian and military authorities and testimony by witnesses, one of which was MacDonald, on January 24, 1975 the grand jury indicted MacDonald for the murder of his family. A series of pre-trial motions and interlocutory appeals delayed trial of the case until July of 1979.

During the seven-week trial of the case, the government presented extensive physical and circumstantial evidence supported by expert and lay testimony. Physical evidence ranging from the amounts of MacDonald's pajama top fibers found in various rooms in the MacDonald residence to the pattern of blood spatterings on the victims and in the rooms of the apartment was offered.[2] The government also pointed to the absence of evidence in the apartment linking Helena Stoeckley or anyone else to the crimes, apparent contradictions in MacDonald's numerous accounts of what transpired that morning, and the marital difficulties MacDonald and his wife were allegedly having prior to February 17, 1970.

MacDonald's defense consisted primarily of his own testimony, character witnesses, and impeachment of the integrity of the crime scene and evidence offered by the

2. As fate would have it, MacDonald, his wife and two daughters all had different blood types: Colette MacDonald — Type A, Jeffrey MacDonald — Type B, Kimberly MacDonald — Type AB and Kristen MacDonald — Type O. This allowed investigators to reconstruct the sequence of events occurring in the MacDonald apartment on the night of the murders.

prosecution. Although Helena Stoeckley was located during the trial and offered as an exculpatory witness, she testified before the jury that she was not involved in the murders but that because of her drug-crazed condition and bizarre behavior following the murders, she at least had come to wonder whether she was in fact involved. The jury apparently believed that she was not, for after six hours of deliberation MacDonald was found guilty of two counts of second-degree murder and one count of first-degree murder. MacDonald's convictions were affirmed on appeal by the Fourth Circuit Court of Appeals and the Supreme Court denied his application for a writ of certiorari. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, U.S. , 103 S.Ct. 726 (1983). After the Supreme Court denied certiorari, MacDonald retained private investigators to interview witnesses, primarily Helena Stoeckley, and review documents in an attempt to either have his convictions set aside or be granted a new trial. This effort culminated in the present motions.

The government seeks to have all of the motions dismissed at the outset claiming that MacDonald knew of the evidence underlying the motions either before or shortly after trial and that he should have raised the issues at trial or on appeal of his convictions. Since he did not, the government argues, he is now procedurally defaulted from pursuing the motions unless he is able to demonstrate cause and actual prejudice for failing to have raised the issues earlier.

It is well-settled that "to obtain collateral relief based on trial errors [not objected to at trial nor argued on appeal], a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68 (1982); *see Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Francis v. Henderson*, 425 U.S. 536, 542 (1976). The reason behind the "cause and actual prejudice" rule

lies in the intent of Congress when it enacted 28 U.S.C. § 2255 to simplify "the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but . ... not to . . . modify the basic distinction between direct review and collateral review." *Frady*, 456 U.S. at 164. Once a criminal defendant has been convicted and his chance to appeal has been waived or exhausted, "[the public is] entitled to presume he stands fairly and finally convicted. . . . *Id.*

All three of MacDonald's motions have at their foundation evidence which he alleges was not discovered until after trial. Part of the newly discovered evidence, he concedes, was known shortly after trial when his convictions were pending on appeal, but the evidence was so undeveloped that it would have been of little use to him had he requested that the appellate courts remand the case to this court for consideration of the new evidence. *See* Rule 33, F.R.Crim.P.; *United States v. Atkinson*, 512 F.2d 1235, 1239-40 (4th Cir. 1975); *United States v. Guthie*, 387 F.2d 569, 572 (4th Cir. 1967), *cert. denied*, 392 U.S. 927 (1968). The government replies that MacDonald had sufficient knowledge of the grounds of the motion when the case was on appeal but chose not to seek a remand for tactical reasons — that by not presenting the evidence before his conviction became final, he assured himself of yet another chance at having the conviction set aside through habeas corpus and new trial motions.

The government's position is not without some merit but procedural default rules are ill-suited to cases as complex and protracted as the present one. The court also has substantial doubt as to whether the cause and actual prejudice test can ever be applied to a case having as its basis newly discovered evidence. Procedural default has traditionally only been applied where a criminal defendant has failed to comply with an established "contemporaneous objection" rule requiring objection during trial. *See Brien v. United States*, 695 F.2d 10, 13-14 (1st

Cir. 1982); *Norris v. United States*, 687 F.2d 899, 906-07 (7th Cir. 1982) (Cudahy, J., concurring); *United States v. Corsentino*, 685 F.2d 48, 50-51 (2nd Cir. 1982); *Pacelli v. United States*, 588, F.2d 360, 363 n.8 (2nd Cir.), *cert. denied*, 441 U.S. 908 (1978). Of course there is no rule requiring contemporaneous objection to evidence the existence of which is not known at trial. Furthermore, the justification for the cause and actual prejudice rule, to preserve the integrity of the initial trial and appellate process, is served by the accepted rules in new trial cases requiring a criminal defendant to prove that the newly discovered evidence was discovered after trial, due diligence was used to discover it, and the new evidence would probably produce a different result on retrial. *United States v. Mesa*, 660 F.2d 1070, 1077 (5th Cir. 1978).

In any event, if the motions are decided against MacDonald on the merits, it will make little difference whether he should have raised the issues at trial or when his convictions were on appeal. Thus, although the cause and actual prejudice test would indeed present a formidable barrier to MacDonald's motions, the court prefers in this instance to address the motions on their merits.

I. The Motion to Vacate Sentence

In his first motion, MacDonald seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 the ground that a government psychiatrist, Dr. James A. Brussel, now deceased, obtained information from him in violation of his Fifth and Sixth Amendment rights and that this information was used by the government as a basis for his cross-examination during trial. The government denies any impropriety or that any of the information provided by MacDonald to Dr. Brussel ever served as a basis for questions asked during cross-examination.

Dr. Brussel, a forensic psychiatrist, first became involved in the case when he was contacted by CID Agent Peter E. Kearns in February of 1971 during the reinvestigation of the case upon conclusion of the Article 32 proceedings. On February 7, 1971, Agent Kearns and CID Agent William F. Ivory met with Dr. Brussel at his home in New York City to discuss the case. After receiving a briefing on the crime scene and reviewing statements of MacDonald, autopsy reports and other background and investigative information, Dr. Brussel told the investigators that it was his opinion that MacDonald may have committed the murders. Motion to Vacate Sentence, Declaration of Karen R. Davidson at Ex. A. He suggested that MacDonald could have killed his wife in a fight, touched off by a disagreement over bedwetting, and then killed his two daughters because they were witnesses to the wife's murder. Dr. Brussel further stated that there were other inconsistencies between the crime scene and MacDonald's version of what happened. For example, if, as the physical evidence seemed to show, Kimberly MacDonald had been injured in the master bedroom and then carried back to her own bedroom, such behavior would be inconsistent with "hippie" involvement. Further, if there had been intruders in the apartment under the influence of LSD, Dr. Brussel believed that there would certainly have been evidence of their presence and MacDonald's claim that the female intruder had chanted "acid is groovy; kill the pigs" rang false.

Nothing more appears about Dr. Brussel in the record until the case came on for trial in July of 1979.[3] Prior to trial, the government filed a motion *in limine* seeking to limit the extent to which expert testimony from another psychiatrist, Dr. Robert L. Sadoff, could be

3. Dr. Brussel's conclusions and observations of February 7, 1971 were cited in two subsequent CID investigative reports but the court is unable to determine the dates of these reports from Exhibits B and C to the Declaration of Karen R. Davidson.

used to support the credibility of MacDonald's account of the attack on his family. Dr. Sadoff proposed to testify that someone with MacDonald's personality configuration was incapable of commiting such a murderous assault on his wife and children. The court initially deferred ruling on the issue, waiting until it arose in the context of the trial, and later ordered that MacDonald submit to an examination by psychiatrists chosen by the government before ruling on the admissibility of Sadoff's testimony. See Trial Tr. at 4766-69, 4839-45. The government chose Dr. Brussel and Dr. Hirsch L. Silverman and it is their interview of MacDonald on the evening of August 13, 1979 which is the subject of the present motion.

The examination of MacDonald by Drs. Brussel and Silverman took place in the office of his defense counsel in Raleigh, North Carolina. Defense counsel were excluded from the interview which began with Dr. Silverman, a psychologist, administering various psychological tests to MacDonald over a two-hour period. At the conclusion of the testing, Dr. Brussel began a question-and-answer session which lasted approximately twenty minutes. According to MacDonald, the examination focused primarily upon the physical evidence in the case and his explanation of discrepancies between the evidence and his account of the murders. He alleges that Dr. Brussel asked him questions from a list which the psychiatrist told him had been provided by the prosecution and that he responded to the questions as follows:

> Dr. Brussel: How do you explain the baby's (Kimberly's) blood spot(s) [on the pajama top]?
>
> MacDonald: I have no idea and I doubt the Army was accurate anyway.
>
> Dr. Brussel: Why wasn't the scene disturbed if you had a violent fight?

MacDonald: It was. And the fight didn't last too long — I was hit in the head.

Dr. Brussel: Who tore your pajamas?

MacDonald: It must have happened in the struggle. I never *heard* ripping. It could have been torn in the struggle or when I took it off my wrists — I have no idea.

Dr. Brussel: Why would you wrap the baby in your pajamas?

MacDonald: (No response. Asked him to rephrase the question.)

Dr. Brussel: Who wiped clean the weapon?

MacDonald: I presume the assailants.

Dr. Brussel: Who wrote on the mirror?

MacDonald: If you mean the headboard, I presume one of the assailants did.

Dr. Brussel: Did you ever wear gloves that night?

MacDonald: Yes. I told the CID I probably wore gloves doing dishes.

Dr. Brussel: Did you have a blanket on the couch, and a pillow:

MacDonald: I believe I had a blanket (I may have said afghan) and the pillow would have been a throw pillow from the couch.

Dr. Brussel: What happened to the blanket and the pillow?

MacDonald: I have no idea.

Dr. Brussel: Why was there no evidence of intruders?

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Dr. Brussel: Did you have a blanket on the couch, and a pillow:

MacDonald: I believe I had a blanket (I may have said afghan) and the pillow would have been a throw pillow from the couch.

Dr. Brussel: What happened to the blanket and the pillow?

MacDonald: I have no idea.

Dr. Brussel: Why was there no evidence of intruders?

MacDonald: There was plenty, all ignored or screwed up by the CID.

Dr. Brussel: Like what?

MacDonald: Mud and debris seen by the MP's; hair in my wife's hand they ignored; the neighbors having been awakened by the dog; others who say strange people; the lost fingerprints from the back door; writing on the headboard.

Dr. Brussel: Who, if not you, put those fibers all over the house?

MacDonald: Contamination from fibers on me, my arms could account for it or from the intruder's weapons or hands, or from the rescuers (MP's, etc.).

Dr. Brussel: Was your pajama top on when you saw your babies?

MacDonald: I was not wearing a top to the best of my recollection — I first went to Colette, but anything was possible.

Dr. Brussel: So you bled all over?

MacDonald: All I could remember was blood everywhere. My memory was of a very bloody scene and I had no idea I was bleeding until I saw it on my chest. When I looked in the bathroom mirror I saw it on my face and chest (I believe).

Dr. Brussel: Was your blood in the sink?

MacDonald: So the Army says. I have no way of knowing *whose* blood was on the sink and I'm not surprised mine was there. I *was* at the sink and everyone knows that.

Dr. Brussel: Who wiped the scene?

MacDonald: (I replied that I didn't know what he was talking about. If he meant the fingerprints, the

critical ones were destroyed by the CID. If he meant the phones, the MP's said they used the phones and *their* fingerprints are not on them, so I presume *they* wiped them once they realized they shouldn't have used them.)

Dr. Brussel: How do you account for the lack of footprints under the windows?

MacDonald: There were no footprints found of MP's who went up to the windows. I have no answer to that.

Dr. Brussel: Why [did you], as a physician, put [your] daughter to bed with wet diapers on?

MacDonald: In most cases a single wet diaper or pair of underwear is not enough to harm anyone and I had in fact known that I was putting Kristen to bed with a wet pair of pants but did not change her for fear of waking her.

Dr. Brussel: [Were you] ever footprinted on February 17th?

MacDonald: No, I was not.

Dr. Brussel: How could [your] wife and children have been overkilled and [you] have suffered . . . just one laceration "⅗ of an inch deep?"

MacDonald: This information is incorrect. I had multiple puncture wounds, stab wounds, several blows to the head and was found unconscious by the MP's.

Dr. Brussel: How could [you] possibly have seen four people in the house when [you were] knocked unconscious?

MacDonald: I saw these people before I was knocked unconscious.

Dr. Brussel: How many of [your] friends and neighbors saw these people enter the apartment?

MacDonald: Several.

Dr. Brussel: Why [were you] sleeping on the couch on the night of the crime?

MacDonald: Kristy had wet the bed.

Motion to Vacate Sentence, Declaration of Jeffrey R. MacDonald.[4]

Dr. Brussel was never called upon to testify at trial because the court eventually excluded the testimony of Dr. Sadoff and there was therefore no reason for the government to call Dr. Brussel or Dr. Silverman in rebuttal. *See United States v. MacDonald*, 485 F.Supp. 1087, 1094-97 (E.D.N.C. 1979), *aff'd*, 688 F.2d at 227-28.[5] Despite this, MacDonald argues that the prosecution used Dr. Brussel as an agent to obtain a preview of his answers to questions about the physical evidence at the crime scene and that this information prompted the following questions, *inter alia*, on cross-examination:

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4. By agreement of the parties in open court on September 20, 1984, the final day of evidentiary hearings on MacDonald's motions, all "affidavits and declarations attached to or offered in connection with the motions and responses and replies thereto in [the] case, on each side, [were] entered . . . in the record without objection from either side," for consideration by the court. Tr. Evid. Hearing, Vol. 2 at 101.

5. MacDonald makes a brief reference to Dr. Silverman also having been debriefed by the government but apparently does not pursue this argument because there is no showing that any of the information obtained from Dr. Silverman's testing of MacDonald was used during cross-examination. For this reason, the court has limited its discussion to the events surrounding Dr. Brussel. It is enough to say that there is insufficient evidence from which the court could conclude that Dr. Silverman was either an agent of the prosecution or provided it with information detrimental to MacDonald.

Prosecution: Suppose the jury should find . . . that Type AB blood, the same as that of your daughter Kimberly, was found on the blue pajama top; and that you were not wearing that pajama top when you went to see Kimberly. Do you have any explanation for that?

MacDonald: Pure conjecture. (Trial Tr. at 6862.)

Prosecution: You did not hear any ripping [of the pajama top] at that time; is that correct?

MacDonald: No. I do not recall hearing ripping sounds. (Trial Tr. at 6835.)

Prosecution: Can you tell us how that [pajama] pocket (which was torn off the pajamas) got there [on the overturned portion of the throw rug]?

MacDonald: It could have fallen from the pajama top when I took it off my wrists. It could have been moved when they moved myself or Colette . . . I have no idea how it got there. I think there are a lot of possibilities. (Trial Tr. at 6847-48.)

Prosecution: Can you tell us how you fell off the sofa and the afghan that was on the sofa stayed on the sofa even though you went off of it?

MacDonald: I am not aware that the afghan stayed on the sofa. (Trial Tr. at 6827.)

Prosecution: Are you saying that you don't know whether it stayed on or off?

MacDonald: That is correct. (Trial Tr. at 6827.)

Prosecution: [S]uppose the Jury should find from the evidence that the blood in the bathroom sink is that of Type B, your blood; and assuming further or supposing further that the jury should find that it was not Type A, Type AB or Type O: do you have an explanation for that?

MacDonald: No. (Trial Tr. at 6881.)

Prosecution: [S]uppose the jury should find from the evidence that there is no blood or was no blood that was sufficient to be typed — sufficient quantities to be typed — on either the telephone in the master bedroom or the kitchen and that they should find from the evidence that you went there and used the phone as you have indicated: do you have any explanation for why there would be no blood?

MacDonald: No. There was blood on my hands. I used the phone. I have no explanation for that lack of finding. (Trial Tr. at 6884.)

Prosecution: [S]uppose the jury should find from the evidence that Type B blood, the same type as yours, is found in only one place on the blue pajama top belonging to you. Do you have any explanation for that, sir?

MacDonald: No. Just pure conjecture. (Trial Tr. at 6891.)

The core of MacDonald's motion to vacate sentence under 28 U.S.C. §2255 is that the government retained Dr. Brussel who was, unknown to the defendants, an investigative agent directed to surreptitiously gather information from MacDonald for cross-examination. This, argues MacDonald, violated his right to effective assistance of counsel under the Sixth Amendment and his due process rights and privilege against self-incrimination under the Fifth Amendment to the Constitution. *See Estelle v. Smith*, 451 U.S. 454, 461-74 (1981); *United States v. Wade*, 388 U.S. 218, 221-27 (1967); *Massiah v. United States*, 377 U.S. 201, 204-07 (1964).

MacDonald principally relies upon two Supreme Court decisions, *Massiah v. United States* and *Estelle v.*

United States, in support of his motion. In *Massiah*, federal law enforcement officers obtained incriminating statements from a criminal defendant, Massiah, who had retained a lawyer and was free on bail following his indictment by installing a radio transmitter in the car of a co-defendant who had decided to cooperate with the government. 377 U.S. at 202-203. The statements were subsequently used against Massiah over his objection at trial and he was convicted of violating federal narcotics laws. *Id.* at 203.

Reversing Massiah's conviction, the Supreme Court held that he "was denied the basic protections of [the Sixth Amendment right to effective assistance of counsel] . . . when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. *Id.* at 206. The Court's decision in *Massiah* thus prevents the prosecution from using an investigative agent to secretly obtain incriminating statements from a criminal defendant in the absence of his attorney and from using these statements against the defendant at trial.

Following its decision in *Massiah*, the Court rendered its opinion in *Estelle v. Smith*, a case more factually similar to MacDonald's. The criminal defendant in *Estelle* was indicted for murder and the state decided to seek the death penalty in a bifurcated proceeding. The trial judge, *sua sponte*, ordered that Smith be examined by Dr. Grigson, a court-appointed psychiatrist, to determine whether he was competent to stand trial. 451 U.S. at 456-57. Dr. Grigson found Smith competent to stand trial and so informed the court. Smith was subsequently convicted of murder following the guilt phase of his trial.

During the penalty phase of Smith's trial, Dr. Grigson was called by the state to testify as to Smith's future dangerousness. Dr. Grigson had concluded from the competency examination, conducted without the permission of Smith's defense counsel, that Smith was a

danger to society and had discussed his findings with the state's attorney and agreed to testify on behalf of the state. *Id.* at 459. He was the only witness for the state and testified that Smith was "a severe sociopath" who had no "regard for another human being's property or . . . life . . ." *Id.* The jury imposed the death penalty and Smith appealed, arguing that the death penalty had been imposed upon him in violation of his Fifth and Fourteenth Amendment rights to due process and freedom from compelled self-incrimination and his Sixth Amendment right to the effective assistance of counsel *Id.* at 460.

Addressing Smith's Fifth Amendment argument first, the Court noted that although the trial judge had "ordered a psychiatric evaluation of respondent [to determine] his competency to stand trial . . . the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent." *Id.* at 465. Under these circumstances, the Court found that "[w]hen Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase . . . his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* The Court went on to conclude that the failure of the state to inform Smith of his rights under *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966), deprived him of the procedural safeguards guaranteed to him by the Fifth Amendment. Based upon similar reasoning and relying upon its earlier decision in *Massiah v. United States*, the Supreme Court also held that Smith's Sixth Amendment right to the effective assistance of counsel was abridged because he was not given the opportunity to consult with his attorney about his participation in the psychiatric examination. *Estelle*, 451 U.S. at 469-73.

Arising from *Massiah* and *Estelle* is the general principle that the prosecution cannot use incriminating information gained from the examination of a defendant by a psychiatrist who is, in fact or in effect, an agent of the prosecution without first informing the defendant of, *inter alia*, his right to remain silent and to consult with his attorney. This principle is of little use to MacDonald here, however, because there is no evidence that the prosecution enlisted Dr. Brussel as an investigative agent, gave him questions to ask MacDonald, debriefed him following the examination, or used any information from the examination against MacDonald during trial.

There is evidence in the record that the defense knew of Dr. Brussel's participation in the case as early as April of 1971. Agent Peter E. Kearns met with chief defense counsel, Bernard Segal, on April 29, 1971 between 11:40 a.m. and 1:30 p.m. at the Americana Hotel in New York City. At that meeting, Kearns told Segal that he would furnish him with names of doctors who would review MacDonald's psychological tests on behalf of the government. Government's Response to Motion to Vacate Sentence, Appendix Vol. II, Ex. L at 1-2 and Attachment 1. Pursuant to their discussion, Kearns sent a letter to Segal on May 17, 1971 and included a Xerox copy of both Doctors Brussel and Silverman's resumes.[6]

From this, it seems beyond doubt that the defense, through Attorney Segal, knew that Dr. Brussel was somehow involved in the case. True, it is likely that defense counsel was unaware of the specifics of the February 6, 1971 interview between Brussel and Agents Kearns and Ivory, but it was certainly on notice that Dr. Brussel had been consulted before trial.

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6. Although a copy of this letter does not appear in the record, it was apparently sent for it was later referred to in a CID investigator's statement dated March 31, 1972. Government's Response to Motion to Vacate Sentence, Appendix Vol. II, Ex. L at Attachment 4.

When the issue of psychiatric testimony came up at trial, the court ruled that before Dr. Sadoff could be called by the defense, the court would allow the prosecution to have MacDonald examined by one of its psychiatrists. Trial Tr. at 4768-69; 4839-45. The government, understandably, chose Dr. Brussel because he, like Dr. Sadoff, had been consulted earlier and was familiar with the case.[7] Although the defense was not on notice that Dr. Brussel had participated in the early stages of the case, the record does not reflect any objection at trial or after trial on this ground. In fact, there would have been no ground for objection since Dr. Brussel had only a very limited role in the case prior to August 13, 1979. He had been consulted only once eight years earlier and had given only preliminary conclusions based upon documentary evidence. Ironically, his ultimate opinion was that "MacDonald is not telling the truth but this fact alone does not mean he is the murderer." Motion to Vacate Sentence, Declaration of Karen R. Davidson, Ex. A at 2. This is hardly sufficient to show that the government had a duty to tell MacDonald or his lawyers of the details of the February 6, 1971 meeting, but even if it were, the evidence shows that the government never used Dr. Brussel as an investigative agent.

The only direct evidence supporting MacDonald's assertion that the prosecution enlisted Dr. Brussel as an investigative agent is contained in MacDonald's own affidavit. *See id.* at Declaration of Jeffrey R. MacDonald. Contradicting this affidavit are the affidavits of two attorneys for the prosecution, Brian M. Murtagh and James L. Blackburn, and the affidavit of Dr. Hirsch L. Silverman, the psychologist who examined MacDonald with Dr. Brussel. Government's Response to Motion to Vacate Sentence, Appendix Vol. II at Ex. F, H and K. Trial counsel for the prosecution unequivocally deny

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7. Dr. Sadoff had testified during the Article 32 hearings in 1970.

that any overtures were ever made to Dr. Brussel to bring him into their camp and Dr. Silverman states that neither he nor Dr. Brussel were furnished with a list of questions to ask MacDonald. Weighed against these affidavits, MacDonald's argument that Dr. Brussel was an investigative agent falls short of the mark. That the government's lawyers were not guilty of such misconduct is further reinforced by the court's recollection that in all stages of the case, counsel for both sides conducted themselves in utmost good faith.

Similarly without merit is MacDonald's supposition that Dr. Brussel was debriefed by government lawyers following the August 13, 1979 examination. There is no direct evidence of this but MacDonald contends that it must have happened because questions similar to those asked during the interview with Dr. Brussel were asked during his cross-examination and it would be illogical to conclude that the government did not debrief its own expert. Such theories are refuted by the affidavits of Murtagh and Silverman. As Murtagh candidly admits, corroborated by Dr. Silverman, he asked the two doctors while driving back from the examination "how the examination had gone, and what their opinion was about MacDonald's makeup, and credibility." Government's Response to Motion to Vacate Sentence, Appendix Vol. II, Ex. F at 7, H at 1-2. Although Dr. Brussel spontaneously stated that he had no doubt that MacDonald had committed the murders, was lying about it, and was a psychotic, no specific information on questions and answers was volunteered to Murtagh or elicited by him. Thus, the court finds that no debriefing took place.

In light of the foregoing, it is readily apparent that Dr. Brussel was never drafted into service by the prosecution to obtain information which was later used during MacDonald's cross-examination. This conclusion is amply supported by the affidavits of Murtagh, Blackburn

and Laura Lipsitz, an attorney who helped prepare cross-examination notebooks during her tenure as a legal intern in the United States Attorney's Office in the summer of 1979. *See id.*, Ex. F at 1-3, K at 1-3, G. As these affidavits indicate, the eight years of investigative work which went into the case prior to its trial in 1979 yielded a more than ample independent basis for the questions asked during cross-examination. There was no reason for the government to rely upon Dr. Brussel as an investigative agent because the government already knew that MacDonald was unable to explain certain physical evidence at the crime scene. For example, CID Agent Shaw and MacDonald had the following exchange on April 6, 1970:

> MacDonald: I'm sure I took this thing [the pajama top] off the first time. I don't — I didn't make a circuit with this jacket on, I don't think. I came down the hallway — I know that — and I went in, and I took it off to get my hands free —
>
> Agent Shaw: Yeah.
>
> MacDonald: — Basically —
>
> Agent Shaw: Okay.
>
> MacDonald: — And sometime while I was in there the first time, I — you know, I put it over my wife.

Government's Trial Exhibit 1135 at 74. Thus, the government knew that as early as April of 1970, MacDonald had been unable to explain how Kimberly MacDonald's blood had come to be on his pajama top for he had said that he took it off before going to her room. Similarly, the government was aware that MacDonald could not explain how his pajama top came to be ripped since during grand jury testimony on January 21, 1975 the following colloquy took place between him and Attorney Victor Woerheide who was handling the case for the government at that time:

Woerheide: Now somewhere in the fight the pajamas were ripped over the. I think you used the term ripped over your head. I was reading something this morning; I thought it was this particular one. But — how would you describe what happened so far as your pajama tops were concerned during the course of the struggle?

MacDonald: I don't know how they got around my hands sir, you keep telling me I said they were ripped. I never said that I know of.

Woerheide: Well, I saw it in something that I was just read —

MacDonald: (Interposing) They were either pulled over my — over my head or was ripped from around my back. I don't know which. I have no idea.

Woerheide: Well, during what phase of the struggle was this. Right at the very end, sort of before you went down and hit the floor?

MacDonald: No, it seemed earlier than that because I remember my hands were bound up.

Woerheide: Oh, did you hear a ripping sound or tearing sound at that time?

MacDonald: No.

Woerheide: Well, do you know in what manner they were torn or —

MacDonald: I have no idea.

Woerheide: All that you knew was they got around your hands and wrists and they hampered you in your struggle?

MacDonald: That's right.

Government's Trial Exhibit 1141 at 4. The government also knew that MacDonald could not explain why fibers

from his pajama top were found throughout the house. This knowledge was gained in early 1970 when CID Agents confronted MacDonald with this evidence in the following series of questions and answers:

AGENT SHAW:

Q: . . . Now, again, your jacket.

A: Pajama top?

Q: Pajama top. Now, we've taken this thing and we've examined it under laboratory conditions. We know what it's made of. We know what kind of fiber is in it. We know that kind of threads are in it. We know how — that it's old.

A: Right.

Q: It's been around a long time. We know that it hasn't been repaired to the extent that there are foreign threads in it. That's —

A: Right.

Q: Okay, now, we have found fibers and threads in various places in the house. And one of the most puzzling things to me, personally, is that we found fibers from this jacket under Colette's body — strung out under her body — and I'm interested in how they came to be there.

A: Shaken off. I don't know. Mayb — do these things shed? Are they laying all around the house? I mean I don't know.

Q: No, it doesn't —

A: You mean they're big fibers?

Q: Yeah.

A: Not —

Q: Not microscopic.

AGENT IVORY:

Q: Not a fuzz.

A: Not a fuzz?

Q: No. It would be fibers and threads.

A: I don't know.

AGENT SHAW:

Q: Okay.

A: I can't answer that.

Government's Trial Exhibit 1135 at 67-69.

As these examples illustrate, the government was well aware of MacDonald's inability to explain certain physical evidence before August 13, 1979. It would be casting at shadows to conclude, as MacDonald does, that the basis of the government's cross-examination was information gained from Dr. Brussel when so much was known about the crimes before trial.

After studying the record and MacDonald's contentions in this motion, the court concludes that the motion is without merit and must be denied. Dr. Brussel was obviously chosen by the government as an expert because of his reputation as a criminologist and knowledge of the case, and not because of his willingness to serve as an investigative agent. There was, therefore, no violation of MacDonald's Sixth Amendment right to counsel or his privilege against self-incrimination and due process rights under the Fifth Amendment. Although Dr. Brussel may have personally believed that MacDonald murdered his family and even had been zealous in his questioning, the government in no way encouraged him or used him as an agent and its actions during this period of the trial are beyond reproach.

II. Motion to Set Aside Judgment of Conviction

The Basis of the Motion

Turning to the second motion brought under 28 U.S.C. § 2255, MacDonald claims that his conviction should be set aside because the government suppressed exculpatory evidence which, had it been introduced at trial, would have caused the jury to aquit him of the murders. The allegedly suppressed evidence includes (1) a half-filled bloody syringe; (2) bloody clothes and boots claimed to have belonged to either Helena Stoeckley or Cathy Perry Williams; (3) skin found under Colette MacDonald's fingernail; and (4) photographs of the letter "G" printed on the wall of Helena Stoeckley's apartment in Nashville, Tennessee. The government responds that it did not suppress any evidence, and that, regardless, the allegedly suppressed evidence is so immaterial that it could not have affected the outcome of the trial.[8]

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8. In his motion and later filings in support of the motion, MacDonald also argued that the government suppressed (1) opinions of CID investigative agents that footprint evidence linking MacDonald to the crimes was unreliable; (2) information that Cathy Perry Williams had committed several stabbings in the Fayetteville area about the time of the MacDonald murders; (3) negatives of seven photographs of unidentified fingerprints taken from the MacDonald home; and lost (4) MacDonald's pajama bottoms. During final arguments on the post-trial motions, counsel for MacDonald in referring to the evidence underlying this motion stated that: "Upon reflection, we think that we were wrong about two or three of them . . . and this morning we will want to abandon our motion as to a couple of them. But on about four of them, we still believe with all out strength [they] . . . would've made a real difference in the case." Transcript of Final Arguments at 19-20, January 14, 1985. The court concludes from this statement that MacDonald has abandoned his claims of suppression with respect to any evidence other than the bloody half-filled syringe, bloody clothes and boots, missing piece of skin, and photographs of the letter "G."

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." From this brief passage, the court left no doubt that once a criminal defendant requests material, exculpatory evidence, the prosecution is under a duty to supply the evidence. Left open by the *Brady* decision was whether this duty existed when the defendant failed to request exculpatory evidence from the prosecution.

The question left open in *Brady* was answered by the Court in *United States v. Agurs*, 427 U.S. 97 (1976), which held that the *Brady* rule applied in three different situations distinguished by the specificity of the criminal defendant's request for the information and the materiality of the evidence requested. In the first situation, the *Brady* rule requires disclosure of evidence which "demonstrates that the prosecution's case include[d] perjured testimony and that the prosecution knew, or should have known, of the perjury." *Agurs*, 427 U.S. at 103; *see Mooney v. Holohan*, 294 U.S. 103, 110-13 (1935). A conviction under such circumstances "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103; *see Giglio v. United States*, 405 U.S. 150, 154 (1972).

The *Brady* rule also applies when the defense has made a specific request for evidence; that is, a request so clear that it gives "the prosecutor notice of exactly what the defense desire[s]." *Agurs*, 427 U.S. at 106. Failure by the government to supply the requested information in this second situation will result in a new trial if the suppressed evidence "might have affected the outcome of the trial." *Id.* at 104.

The *Agurs* court also found that the *Brady* rule imposes a duty upon the prosecutor to disclose material,

exculpatory evidence even though the defense has made only a general request for exculpatory evidence or has made no request. The prosecutor commits constitutional error in such cases if he fails to disclose exculpatory evidence which would "create[] a reasonable doubt that did not otherwise exist . . . ." *Id.* at 112.

In pleadings filed with the court and during oral argument, counsel for MacDonald has insisted that either the "any reasonable likelihood" or "might have affected the outcome of the trial" test should be applied to the facts of the case. Not surprisingly, the government takes the opposite view, arguing that assuming there has been a suppression of evidence, the court should apply the last *Brady* test and set aside the convictions and order a new trial only if suppressed evidence is found to "create a reasonable doubt which did not otherwise exist." Settlement of this disagreement only becomes necessary, of course, if it is first found that (1) the items were suppressed and (2) the evidence would have been favorable to the defense. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *United States v. Anderson*, 574 F.2d 1347, 1353 (5th Cir. 1978). After reviewing the evidence and arguments on both sides, the court concludes that the government did not suppress evidence and, in any event, there has been an insufficient showing that the four items would have been favorable to the defense if introduced at trial.

1. The Half-Filled Bloody Syringe

MacDonald first contends that the government suppressed the existence of a half-filled bloody syringe which could have proved that he did not commit the murders. During the investigation of the crime scene at 544 Castle Drive, Fort Bragg, North Carolina, investigators found a variety of medical supplies in a hall linen closet. Among the supplies were seventy medications, at least fourteen disposable hypodermic syringes and eight

boxes of hypodermic needles each containing twelve needles. Government's Response to Motion to Set Aside Conviction at Ex. B, Government's Trial Exhibits 1147-48. The closet also contained linen, and the sliding door to the closet was stained with the blood of Jeffrey MacDonald Government's Trial Exhibit 344.

Hilyar O. Medlin was in charge of a group of technicians dispatched by the Army from its Fort Gordon, Georgia, Criminal Investigation Laboratory to assist CID investigators in processing the MacDonald crime scene. On February 21, 1970, the last day that investigators were at the MacDonald apartment, Medlin was debriefed by Special Agent Tool during the course of which he stated "that a half filled syringe that contained an as yet unknown fluid was located in a hall closet, which also contained some evidence of blood." Motion to Set Aside Judgment of Conviction, Declaration of Brian O'Neill at Ex. A. He also said that It "appeared that someone with a bloody hand had reached into this cabinet containing medical supplies for some purpose." *Id.* The record is thereafter devoid of any further reference to this specific syringe.

MacDonald asserts that despite his request on several occasions for statements made by Medline, the government failed to furnish him with the February 21, 1970 statement in which Medlin refers to the "half-filled bloody syringe." According to MacDonald, this non-disclosure by the government was a deliberate suppression of exculpatory evidence which violated his due process rights. The evidence is exculpatory, he argues, because the mere presence of a half-filled syringe with blood on it in the linen closet would substantiate his explanation that the murders had been committed by drug-seeking intruders. Furthermore, the blood on the syringe could have been typed and fingerprints processed, thereby possibly providing evidence which would have completely exonerated him of the crimes.

The government replies to MacDonald's assertions by providing a number of affidavits offered to show that no "half-filled bloody syringe" was found at the crime scene and that either MacDonald or his defense lawyers were aware of Medlin's statement to Special Agent Tool. The government goes on to argue that even if the syringe did exist and its existence was suppressed, it is pure speculation to suggest that the evidence was of itself exculpatory or could have yielded exculpatory evidence.

It is not necessary for the court to decide whether MacDonald or his attorneys knew of Medlin's statement prior to trial for there is insufficient evidence in the case from which the court could conclude that a "half-filled bloody syringe" ever existed. There is also insufficient evidence to support the conclusion that if such a syringe did exist, it would have provided exculpatory evidence to the benefit of MacDonald.

The only evidence that a "half-filled bloody syringe" ever existed is contained in Medlin's somewhat ambiguous statement to Agent Tool.[9] As Medlin's affidavit indicates, when he made his statement to Agent Tool he was only summarizing the information provided to him by other members of the crime scene processing team. Government's Response to Motion to Set Aside Conviction, Ex. B at 2. He had no first-hand knowledge of the contents of the closet and denies ever seeing a half-filled syringe which bore blood stains. The implication of his statement and its secondhand nature is that Medlin misunderstood what the other investigators told him about the contents of the closet. In fact this is what must have

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9. Medlin's statement that "a half-filled syringe that contained an as yet unknown fluid was located in a hall closet, which also contained some evidence of blood" is susceptible of two readings. Either the hall closet or the syringe, if it existed, could have been bloody. The court notes in passing that the former reading may be correct since there was physical evidence which showed that the sliding door to the hall closet was stained with Jeffrey MacDonald's blood.

occurred, for investigative agents having first-hand knowledge of the contents of the hall closet state, or would state if called to testify at trial, that no "bloody half-filled syringe" or other half-filled syringe was found in the closet. *Id.*, Ex. D at 2; *see* Evidentiary Hearing Tr., Vol. 2 at 105. Moreover, the chemist who processed the hall closet for blood stains, Craig Chamberlain, and the agent who inventoried the medical supplies in the closet, Hagan Rossi, state without reservation that no half-filled syringe of any kind was found during the crime scene invetigation. *See id.* at 105.[10] Measured against these statements by four witnesses having first-hand knowledge of the evidence gathered from the crime scene, MacDonald's argument, based as it is upon the statement of one witness summarizing information conveyed to him by others, that the government has suppressed evidence of a "half-filled bloody syringe" is simply not plausible.

Even if the syringe had existed, MacDonald's arguments would yet fail because he has not shown that the evidence would be favorable to him. *See Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *United States v. Barshov*, 733 F.2d 842, 848 (11th Cir. 1984). The "mere possibility that [discovery of the syringe] might have helped [MacDonald], or might have affected the outcome of the trial, does not establish [materially] in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976); *see United States v. Jackson*, 579 F.2d 553, 560 (10th Cir. 1978); *Mixon v. Attorney General of State of South Carolina*, 538 F.Supp. 190, 193 (D.S.C. 1982). As counsel for MacDonald conceded at oral argument, the evidence may have well been unfavorable to MacDonald at trial. MacDonald has therefore failed to offer enough

10. The parties stipulated on the final day of the evidentiary hearing on the motions that if called to testify, Dr. Chamberlain, CID Agent Shaw and Hagan Rossi would testify that no half-filled syringes, with or without blood stains, were found during processing of the crime scene. Evidentiary Hearing Tr., Vol. 2 at 104-05.

evidence from which the court could find that the syringe, assuming its existence, or evidence derived therefrom, would have been of value to him either before or during his trial. Similarly, even if the government suppressed Medlin's statements to Agent Tool concerning the syringe, an assumption which the evidence also does not support, knowledge of Medlin's statements would have been to no avail to MacDonald since the underlying evidence did not exist. MacDonald's argument that he could have used Agent Medlin's statement to impeach the integrity of the crime scene and attack Medlin's credibility is also unconvincing in view of the fact that these tactics were used extensively at trial and to the extent that Medlin's statement tended to prove these issues it would only be cumulative. *See Agurs*, 427 U.S. at 109-10; *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in judgment).

2. The Bloody Clothes and Boots

MacDonald has consistently claimed that Helena Stoeckley, more about whom will be said later, participated in the murder of his family on February 17, 1970 and was wearing a floppy hat, short skirt and boots on that night. MacDonald now claims that in early 1971, the CID came into possession of bloody clothes and boots belonging either to Helena Stoeckley or to Cathy Perry Williams, a friend of Stoeckley. The boots were later returned by the CID to a friend of Williams and MacDonald now alleges that despite a June 13, 1979 pre-trial discovery request in which he sought "all information in the Government's possession which is of an exculpatory nature, including, but not limited to, recent reports by citizens of possible suspects, police and other investigatory files of possible suspects" and the CID's thirteen-volume investigation report on the crimes, the government never disclosed any information regarding the bloody clothes

and boots to the defense team. The government concedes that the CID did have possession of the boots in 1971 but denies that there was any blood on the boots or that any clothes were ever turned over to the CID. The government also contends that MacDonald, through two of his former attorneys, knew that the CID once had possession of the boots and that the boots were properly returned to the woman who gave them to the CID because they did not match MacDonald's description of those worn by the female assailant and a laboratory analysis of the boots yielded no evidence connecting the boots to the crimes.

The history of how the "bloody clothes and boots" fell into the hands of the CID is as bizarre as other aspects of the case. Jackie Don Wolverton, a soldier stationed at Fort Bragg, North Carolina, awoke on the morning of December 29, 1970 to find that he was being stabbed by his roomate, Cathy Perry (now Cathy Perry Williams). Government's Response to Motion to Set Aside Conviction, Ex. J at 5-8 and Attachment 6. For obvious reasons, Wolverton threw Williams out of the apartment and gathered some of her belongings which he took to Mrs. Betty J. Garcia, another friend of Williams'. Mrs. Garcia accepted the items and Cathy Perry Williams moved in with her for a few days sometime shortly after the stabbing. After living with her a short time Mrs. Garcia concluded that Williams was suffering from severe mental problems created by drug addiction because she suffered from hallucinations and wore the same clothes every day for as long as she stayed with Mrs. Garcia. *See* Government's Response to Motion for New Trial, Appendix Vol. I, Ex. L at 5-7. This conclusion was reinforced by the fact that Williams had previously stabbed her own puppy to death while under the influence of drugs and had attempted to stab Mrs. Garcia's son shortly after the stabbing incident involving Wolverton.

After attempting unsuccessfully to help Williams, Mrs. Garcia contacted her uncle who picked her up and

took her to a mental hospital in Raleigh, North Carolina. Mrs. Garcia then asked Jackie Don Wolverton to help her collect the remainder of Williams' belongings and Wolverton went around to various places Williams had stayed gathering things which he thought belonged to her but possibly could have belonged to other people. While going through the clothing, Mrs. Garcia found a pair of beige boots and some other items which led her to believe that Williams was involved in the MacDonald case.[11] *Id.* Through a newspaper reporter, Mrs. Garcia then contacted FBI Special Agent Lacy M. Walthall for assistance. Affidavit of Lacy M. Walthall, Jr., at 1, June 12, 1984.

Special Agent Walthall attempted to interview Mrs. Garcia on January 5, 1971, but she refused to open her door and told him that she had given all of Cathy Perry Williams' possessions to her lawyer, Charles Kirkman. *Id.* Kirkman in turn turned over the items to an associate, James R. Nance, who had represented MacDonald in a civil action before Chief Judge Algernon L. Butler of this court following the dismissal of charges against him by the military. Nance went to the office of Captain James Douthat, MacDonald's appointed military counsel at the Article 32 proceedings, the afternoon of January 6, 1971 and released Williams' belongings to CID agents William Ivory and Peter Kearns. In return Agent Ivory prepared a Military Police Receipt for Property listing the articles received from Nance, and signed by Ivory, Nance and Douthat. Included among the items turned over to the CID for evidence evaluation was a "Pair of Woman's boots, beige, w/tag THE GREAT BOOTS by GOLD SEAL." Government's Response to Motion to Set Aside

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11. No specifics appear in the record concerning what belongings of Williams led Mrs. Garcia to conclude that she had been involved in the murders.

Conviction, Exhibit N. There were no clothes listed on the receipt nor was there any indication that the boots or any of the items were blood-stained.
Id. at , 104 S.Ct. 2534. Rather, "the officers . . . were acting 'in good faith and in accord with their normal practices.' " *Id.* at , 104 S.Ct. 2534 (*quoting Killian*, 368 U.S. at 242). The court went on to note that respondents had failed to show that the breath samples possessed "exculpatory value that was apparent before the evidence was destroyed [and that the evidence was] . . . of such a nature that the [respondents] would be unable to obtain comparable evidence by other reasonably available means." *Id.* at , 104 S.Ct. at 2534; *see United States v. Webster*, 750 F.2d 307, 332-34 (5th Cir. 1985).

Although *Trombetta* involved intentionally destroyed evidence whereas MacDonald's claim is that evidence relative to his defense has been lost, the principles announced by the Supreme Court are useful in the present case. Like *Trombetta*, there has been no showing that the government acted in bad faith or radically departed from normal practices in handling this piece of evidence. The government was no doubt negligent in failing to preserve this unique piece of evidence which had a potentially significant impact on the case but it appears from the record that the loss of this evidence was completely accidental.

The court also concludes, consistent with *Trombetta*, "that the chances are extremely low that [the piece of skin] would have been exculpatory." *Id.* at , 104 S.Ct. 2534. MacDonald contends that this evidence could have completely cleared him of the murders. This contention ignores the substantial direct evidence introduced by the government at trial, more fully addressed in the court's discussion of his motion for a new trial, and evidence tending to show that the piece of skin may very well have belonged to MacDonald.

At trial, military policeman Kenneth Mica testified that on the day of the murders MacDonald had scratch marks which looked as though "somebody had dug their fingernails into his chest." Trial Tr. at 1413. This observation and the significant amount of physical evidence which contradicted MacDonald's version of the murders diminishes the possibility that the skin found under Colette MacDonald's fingernail would have exonerated MacDonald. Because there is no evidence to support a finding that the government acted in bad faith in losing this potentially valuable evidence and its exculpatory value is open to serious doubt, the court concludes that the loss of the piece of skin did not violate MacDonald's due process rights under the Fifth Amendment to the Constitution.

MacDonald's arguments under *Brady* and *Agurs* are slightly more substantial but again the court finds that there has been no suppression of evidence. The CID laboratory report of August 31, 1971 is not a paragon of clarity but it was at least sufficient to put the defense on notice that the piece of skin referred to in Dr. Gammel's autopsy report and testimony at the Article 32 hearings no longer existed. Furthermore, although Agent Ivory's statements would possibly have highlighted the loss of the skin to the defense, the court finds that the statements would have been of little use to MacDonald in light of the questionable exculpatory value of the evidence and their use for impeachment purposes would merely have been cumulative. In short, while the court cannot condone the government's loss of this piece of evidence, neither can it conclude that there has been a suppression of evidence contrary to the requirements of *Brady* and *Agurs*.

4. The Photographs of the Letter "G"

Sometime after the MacDonald murders, Helena Stoeckley moved to Nashville, Tennessee where she began working as an informer for the Nashville Police Department. The police installed electronic surveillance equipment in her apartment at 1910 Portland Avenue and monitored the equipment from her former apartment at 1905 Portland Avenue.

CID Agent Richard J. Mahon was assigned responsibility in December of 1970 to investigate Stoeckley to determine whether she was involved in the MacDonald murders. Because Stoeckley had refused to be fingerprinted, Mahon traveled to Nashville on April 21, 1971 to attempt to gather finger and palm prints from the walls at 1905 Portland Avenue and CID photographer Frank M. Toledo went with him to take photographs of the walls. Toledo had previously worked on the MacDonald case and had seen the crime scene at 544 Castle Drive.

Toledo took forty photographs at 1905 Portland Avenue, making handwritten notes about each exposure as he went along. *See* Motion to Set Aside Judgment of Conviction, Declaration of Brian O'Neill at Exhibit G. Stoeckley had apparently put palm and fingerprints on the walls in paint and had also written on them in paint. Toledo took pictures of both the prints and the writing. As he was photographing the words written on the walls, Toledo had a "flashback" to the MacDonald crime scene and thought that the letter "G" in words such as "Good" and "Gemini" on the walls resembled the letter "G" in the word "PIG" which was written in blood on the headboard in the master bedroom of the MacDonald apartment. Government's Response to Motion to Set Aside Conviction, Ex. H at 2. He wrote this observation next to exposure No. 3 in his handwritten notes and referred to it again following his No. 5 exposure.

Toledo's observation never made it into his final typed report. In this report, he noted only that he had

taken a picture of the "[l]etter "G" as part of some printings on the walls of" Stoeckley's apartment. Motion to Set Aside Conviction, Declaration of Brian O'Neill at Exhibit H. The similarity noted by Toledo was also not mentioned in Agent Mahon's report. *Id.* at Exhibit I. MacDonald now argues that the government suppressed evidence because it never gave him copies of Toledo's photographs or his notes. Without this information, MacDonald says that he was unable to corroborate his version of the murders by arguing to the jury that the "G" on the wall of Stoeckley's apartment in Nashville was similar to the "G" appearing in blood on the headboard at the crime scene. Further, he claims that without having access to the photographs, he was deprived of the opportunity to have a handwriting expert compare the "G's" to determine who wrote them.

Although MacDonald may be correct that the government failed to provide him with Toledo's handwritten notes prior to trial, it appears that he did have access to the photographs. The government contends, and MacDonald does not seriously dispute, that the photographs were with a set of fingerprint photographs made available to the defense before trial. MacDonald counters, however, that when he gained access to the photographs there was insufficient time to review them prior to trial and in any event the defense would not have been aware of their significance without Agent Toledo's notes.

Regardless of whether the defense knew or should have known about the photographs, MacDonald has failed to demonstrate that this evidence would have been favorable to him. In a recent affidavit, Toledo states that not only did the "G's" on the walls resemble the "G" on the headboard at the MacDonald apartment, they also looked like "G's" which Toledo had seen in MacDonald's military course notebooks. Government's Response to Motion to Set Aside Conviction, Ex. H at 2. Moreover,

recent analysis by the FBI at the request of the government showed that neither the "G's" on the walls in Nashville nor the "G" on the headboard at the crime scene "contain[] the inherent individual characteristics essential to . . . meaningful comparison." *Id.*, Ex. W at 2. In other words, the letters do not have sufficient distinguishing characteristics to enable the FBI or anyone else to determine whether they were made by the same hand. It follows therefore that MacDonald has failed to introduce any facts from which the court could find that this evidence was exculpatory.

As with all items of evidence which are the subject of this motion, MacDonald asserts that the CID purposely failed to disclose documents and that if he had known of these documents at trial he could have impeached government witnesses or the integrity of the crime scene. This of course is precisely what was done at trial and the court again finds that any such evidence would only have been cumulative. *See United States v. Agurs*, 427 U.S. at 109 n.16.

Conclusion

As the Supreme Court said in *Brady v. Maryland*, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. The court has cautiously reviewed the hundreds of pages supporting the contentions of the parties to determine whether there has been any suppression of evidence which could have been of exculpatory value to the defense. Over nine years passed between the murders and the trial of the case and, as is typical of cases of this magnitude, it generated an incredible amount of evidence and documents.[12] The

12. The parties have argued back and forth over whether many of the affidavits pertaining to this motion would be inadmissible hearsay at a new trial if one were held. Since the overwhelming

court has not found, however, that the government suppressed any evidence or acted in bad faith in responding to the defense's requests for exculpatory material. Because there has been no suppression of evidence and the items which MacDonald claims were suppressed would, in all probability, have been of no exculpatory value to him, the motion to vacate sentence must be denied.

Even if the court found that the government has suppressed exculpatory evidence, it would not necessarily follow that MacDonald's conviction must be set aside. As *Brady v. Maryland* and *United States v. Agurs* make clear, once the court has found that the government has suppressed exculpatory evidence, whether a conviction will be set aside depends upon the effect the evidence would have had on the trial. As noted earlier, if perjured testimony is knowingly used by the prosecution, a criminal defendant's conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Agurs*, 427 U.S. at 103. If, on the other hand, the exculpatory evidence was suppressed following a specific request by the defense, relief will be awarded if the evidence might have affected the outcome of the trial. *Id.* at 104, Finally, if the defense failed to request the suppressed evidence or made only a general request, a conviction will be set aside if the evidence would create a reasonable doubt which did not otherwise exist. *Id.* at 112. As we shall soon see, the evidence MacDonald claims to have been suppressed would not have affected the outcome of his trial under any of the three *Agurs* tests.

IV. The New Trial Motion

Claiming that he has newly discovered evidence which would convince a jury that intruders murdered

NOTES *(Continued)*

majority of the affidavits are from or refer to witnesses who would have no reason to refuse to testify at a second trial, the court has assumed the evidence to be admissible.

his wife and daughters, MacDonald seeks a new trial on the murder charges pursuant to Rule 33 of the Federal Rules of Criminal Procedure.[13] In support of his motion, MacDonald has filed almost 1,000 pages of transcripts of "confessions" allegedly made by Helena Stoeckley to private investigators and statements by Greg Mitchell and Cathy Perry Williams which he offers to show their participation in the crimes. The motion is further supported by dozens of affidavits of witnesses who MacDonald says corroborate the involvement of Stoeckley, Mitchell and Perry. The government has opposed the motion by submitting four volumes of affidavits of its own which contradict or impeach the evidence offered by MacDonald. The parties sharply disagree on the legal standard applicable to this motion and whether the evidence offered by MacDonald would be admissible even if a new trial were granted. Before answering these questions, a review of the government's evidence at trail and the substance of the newly discovered evidence is necessary.

A. The Government's Evidence

Over the course of the seven-week trial of the case, the prosecution called twenty-eight expert and lay witnesses and introduced approximately 1,100 pieces of evidence in support of its case against MacDonald. The government's theory of the case was that MacDonald and his wife were having marital problems and began arguing on the night of the murders over their youngest daughter's bedwetting. Already fatigued from long hours of work, MacDonald flew into a rage and killed his wife

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13. This rule provides, in pertinent part, that "[t]he court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . ." Rule 33, F.R.Crim.P.

and oldest daughter. MacDonald, according to the prosecution, then attempted to avoid prosecution and punishment by killing his youngest daughter and staging the crime scene to make it appear as if the murders had been committed by intruders. Ample circumstantial and direct evidence was introduced to support this theory at trial.

Colette and Jeffrey MacDonald were married while in college and by all accounts they were happy until at least late 1969 or early 1970. Colette's mother, Mildred Kassab, and the family's babysitter testified at trial that they noticed a change in the marital relationship sometime in early 1970. *See* Trial Tr. at 3263, 3558. On February 15 1970, two days before the murders, Mildred Kassab spoke with her daughter on the telephone and Colette told her that she was not doing very well and was upset because her husband was going to be out of the country when their third child was born. *Id.* at 3268-69. She told her mother that she would "like to come home." *Id.* at 3269. Mrs. Kassab also testified that the MacDonalds, not unlike most young couples. often had financial problems. *See id.* at 3261-64.

Colette MacDonald had enrolled in a child psychology class at the North Carolina State University Extension at Fort Bragg, North Carolina, and attended class the night of February 16, 1970, less than twelve hours before the murders. One of her classmates, Elizabeth Ramage, testified at trial that Colette had started a class discussion that night by asking her psychology professor what should be done with her youngest daughter who often climbed into bed with her parents. *Id.* at 2824-25. The classmate, a friend of Colette's, testified that this was the only occasion on which she recalled Colette speaking in class. *Id.* at 2824. Following class, Elizabeth Ramage rode home with Colette and was the last person outside the family to see her before she was murdered. There were, of course, no witnesses for the prosecution to call in support of its theroy that Colette MacDonald went home and later began arguing with Jeffrey

MacDonald over bedwetting, but there was evidence of urine on a bed sheet in the master bedroom. Government's Response to Motion to Set Aside Conviction, Exhibit U.

Although the evidence offered to show that Colette and Jeffrey MacDonald were having marital problems and had a disagreement over their children's bedwetting which escalated into the murders was circumstantial, the prosecution also introduced an almost overwhelming amount of physical and other circumstantial evidence in support of its theory of the case. Because of the length of the trial and the amount of evidence introduced, it is not practical for the court to chronicle the evidence in great detail, but the following is a summary of the more significant evidence.

1. The Murder Weapons

After MacDonald's telephone call to military police on the morning of February 17, 1970, CID Agent Robert Shaw was dispatched to investigate the crime scene. In the rear of the apartment, outside a utility room door, Agent Shaw found a Old Hickory brand steel paring knife, an icepick, and a blood-stained piece of wood approximately 1⅝ inches by 1½ inches. Trial Tr. at 2340-44. Shaw also found a Geneva Forge Company paring knife with a bent blade in the master bedroom near a dresser. *Id.* at 2364.

The government was able to prove through laboratory analysis and expert testimony that the club, two knives, and icepick were the murder weapons. The club bore Colette and Kimberly MacDonald's blood and a splinter bearing Colette's blood type was found on a rug adjacent to where her head had rested in the master bedrom. Colette's blood was also found on the Geneva Forge knife. The autopsies of the MacDonald family also linked the four weapons to the crimes. Colette MacDonald's death had resulted from blunt trauma

wounds which could have been caused by the club, sixteen stab wounds consistent with the Old Hickory paring knife, and twenty-one puncture wounds probably made by the icepick. Kimberly MacDonald died of blunt trauma wounds and stab wounds and Kristen MacDonald was killed by stab wounds and puncture wounds from an icepick.

MacDonald denied any knowledge of the murder weapons but the government offered evidence from which the jury could have found that the weapons came from the MacDonald home. For example, the wooden club was shown to have once been part of a larger piece of wood which was a bed slat in Kimberly MacDonald's bed because it perfectly matched the annual growth rings of the slat. *Id.* at 3812. Similarly, MacDonald claimed to have never had an icepick but there was testimony from two witnesses, Mildred Kassab and Pamela Kalin Cochran, that they had used an icepick in the MacDonald home to help them get frozen food out of the family's freezer. This evidence negated any contention that the weapons belonged to intruders and that they had brought them with them when they entered the apartment. Finally, although MacDonald told CID Agent Paul Connolly that one of the assailants in the living room had hit him with a piece of wood which he thought was a baseball bat, an extensive search of the living room yielded nothing to support his statement. *Id.* at 1727-28, 2684.

From the evidence connecting MacDonald to the murder weapons and his denial, in the face of contradicting testimony, that he had ever seen the weapons, the prosecution argued that he had used these weapons to murder his family. The lack of any physical evidence supporting MacDonald's claim that he had been attacked in his living room by drug-crazed intruders wielding these weapons directly supported this theory.

2. The Pajama Top and Pajama Top Demonstration

During an interview with CID investigators on April 6, 1970, MacDonald gave the following explanation as to why his pajama top was found on his wife's body:

> Agent Shaw: Captain MacDonald, you told one of the other investigators earlier that you were wearing a pajama top that was pulled over your head, or something like that.
>
> MacDonald: Right. Well, all I know is that — well, when I was struggling now — after I had been hit the first time, I was struggling with these guys; and my — somehow, my pajama top — I don't know if it was ripped forward or pulled over my head. I don't think it was pulled over my head. I don't remember actually — like backing my head through it.
>
> But all of a sudden, it was all around my hands and it was in my way. And I remember that I was holding this thing in my hand — the guy's hand — that — that I couldn't maneuver very well. My hands were kind of wrapped up in the thing.
>
> And as they were punching me, I was kind of using that a little bit, you know, holding it — right, exactly — 'cause this guy, I thought, was really punching me in the chest, you know, and in the stomach 'cause I — I was getting hit across here (pointing to the mid-section of his body).
>
> So, in effect, I was blunting everything by, you know, holding this up; and I couldn't get my hands free out of this thing. And I remember I ended up, when I was laying on the floor — I forgot to say that — when I woke up on — it was still around my hands and everything, and I took it off as I was going in the bedroom. And after I took this knife out of my wife's chest, I — [put the pajama top on her chest,] you

> know, keeping her warm. You know, to treat shock, that would be (inaudible) and keep them warm.

Government's Trial Ex. 1135 at 12-13. This account of what happened on the morning of the murders was again contradicted by physical evidence introduced by the prosecution.

Paul Stombaugh, a former FBI special agent in charge of the Chemistry Branch of the Chemistry and Physics Section of the FBI's crime laboratory, testified that MacDonald's blue pajama top was made from a blend of polyester and cotton, was sewn at the seams with purple cotton thread and at the cuffs with blue-black cotton thread, and that the polyester yarns used in the garment were blue. Trial Tr. at 4090. Although MacDonald had said that he was not wearing the pajama top when he left the master bedroom, threads and yarns were found both inside and outside the apartment. A search of Kimberly MacDonald's bedroom yielded fourteen purple threads and five blue yarns and Kristen MacDonald's bedroom contained one purple thread and a blue yarn. Two purple threads were also on the blood-stained wooden club which was found outside the house near a utility room door. Contrary to MacDonald's statement that he had placed his pajama top on his wife's body upon entering the master bedroom, the testimony showed that threads were found within the body outline of Colette MacDonald. In fact, sixty purple threads, eighteen blue polyester yarns, and one blue-black cotton thread were found in the master bedroom. No threads or yarns, however, were found in the living room where MacDonald said he had been attacked. *Id.* at 1727.28.

The prosecution also used the pajama top itself as evidence that MacDonald had murdered his family. Theorizing that the pajama top had become blood-stained during MacDonald's fatal attack on his wife and that MacDonald had put it on her and then repeatedly

stabbed her with an icepick to create the illusion of a massacre, the government offered evidence which showed that the garment was stationary when the forty-eight puncture holes in it were made. *Id.* at 4074-75. The government also had laboratory experts fold the top in the same manner as it was found on Colette MacDonald's body to determine whether the pattern of forty-eight holes in the garment and in the body in any way coincided. The resulting demonstration showed that after the top was folded, a pattern of twenty-one punctures emerged, and these punctures, five on the right side and sixteen on the left, bore a striking resemblance to the pattern of icepick wounds suffered by Colette MacDonald.[14] Thus, MacDonald's own pajama top was perhaps the most incriminating evidence offered against him during the trial.

3. The Pajama Top Pocket

According to MacDonald, after he awoke on the hall steps in the living room he went directly to the master bedroom where he found his wife's body. He then took his pajama top, from which he had been disengaging his hands as he was going down the hall, and placed it over her body.

While investigating the crime scene, CID Agents Ivory and Shaw found the pocket to MacDonalds pajama top on a throw rug at the feet of Colette MacDonald. Expert testimony was offered at trial which proved that the pocket was stained with Colette MacDonald's type blood and that it had been stained prior to the pocket being torn from the pajama top. Trial Tr. at 3605-12. This evidence directly refuted MacDonald's statements about what he did after regaining consciousness and was offered by the prosecution to prove that the pajama top had been torn

14. MacDonald unsuccessfully challenged the admissibility of this demonstration on appeal. 688 F.2d 224, 228 (4th Cir. 1982, *cert. denied*, U.S. , 103 S.Ct. 726 (1983).

during a struggle with his wife. It also further supported the government's theory that MacDonald had put the garment on his wife and then stabbed her with an icepick to make his account of the murders more believable.

4. MacDonald's Eyeglasses

MacDonald told investigators that he had not been wearing his eyeglasses when he woke and began his futile effort to revive his family. This statement was claimed to be false because the eyeglasses, which were found in the living room face down, were found to have Kristen MacDonald's blood on them. The government argued that this inconsistency proved that the glasses had been stained during MacDonald's attack on his family.

5. The Bloody Footprint

A footprint stained with Colette MacDonald's blood was found leaving Kristen MacDonald's bedroom but no footprint was found entering the room. Laboratory analysis showed the footprint to be MacDonald's and he conceded that it was his and was probably stained in his wife's blood since he was in the master bedroom before going to Kristen's room. At trial, the government pointed to the inconsistency in MacDonald's story because no footprints were found entering Kristen's room. The prosecution used this evidence to support its theory that Colette had actually been assaulted in Kristen's room and then carried back into the master bedroom.

6. The Pieces of Latex Gloves

Pieces of a latex glove were found by CID investigators in the master bedrom between the body of Colette MacDonald and the master bed's headboard and inside the master bed sheet in a pile of bedding at the foot of the

bed. Trial Tr. at 1729-31. Both pieces of latex were stained by blood of Colette's type and expert testimony showed that they were similar to latex surgeon gloves which were found under the kitchen sink in the MacDonald apartment. MacDonald's blood was also found near the kitchen sink. The prosecution argued that this evidence showed that MacDonald had worn latex gloves while murdering his family to avoid fingerprints and had written the word "PIG" in his wife's blood on the master bed headboard while wearing the gloves since there were no ridge lines in the writing as there would have been had the writing been made by a bare finger.

7. The Blood Spatterings and the Government's Reconstruciton of the Crime Scene

The government drew support for its theory that MacDonald and his wife had an argument on the night of the murders which eventually led to the death of his wife and two daughters from the extensive blood spatterings throughout the apartment. Military police found Kimberly MacDonald's body in her bed when they arrived at the crime scene but they also found evidence of her blood on the master bedroom rug, the bathmat MacDonald said he had put on top of Colette MacDonald's body, a sheet from the master bed, and the wooden club which the government proved was used as one of the murder weapons. Trial Tr. 3639-46, 3661-77. There was also uncontradicted testimony that Kimberly's blood was found on MacDonald's pajama top even though he had testified that he was not wearing the pajama top when he went to Kimberly's bedroom.

The government used this evidence to argue to the jury that Kimberly had come into the master bedroom when MacDonald and his wife were arguing and had been struck during the argument. The government further argued that the presence of Kimberly's blood in the

hallway of the apartment showed that MacDonald had carried her back to her bedroom after she had been assaulted. Based on Kimberly's blood spatterings which were found on the wall of her bedroom and the fact that her body was found in that room, the government claimed that MacDonald had again assaulted her after returning her to her room to further support his story that the family had been attacked by four intruders while they were sleeping.

Blood spatterings in Colette MacDonald's blood type were found not only in the master bedroom but also in Kristen MacDonald's bedroom. Though Colette's blood was not found on the floor in Kristen's bedroom, it was found on the top and bottom sheet of Kristen's bed, *id.* at 3676-77, and on the master bed bedspread found wrapped in a sheet in the master bedroom next to Colette's body. The government contended that this evidence proved MacDonald had first attacked his wife in the master bedroom but that she had survived this attack and had gone to her youngest daughter's bedroom to either protect her or to continue the fight. The presence of Colette's blood on Kristen's bed and absence of it on the floor of the bedroom led the government to argue before the jury that MacDonald had again assaulted his wife in Kristen's bedroom but had placed her body on the master bed bedspread and sheet and carried it back into the master bedroom in an attempt to reinforce his story. The most striking evidence supporting this part of the government's theory of the case was MacDonald's footprint in Colette's blood which was found leaving Kristen's bedroom.

Kristen MacDonald's blood was found mixed with her mother's on Kristen's bed linen. Some of her blood was also found on the floor of her bedroom. The government's theory was that Kristen was not injured by her father in a fit of anger, but was intentionally stabbed to death by him to complete a staged crime scene which

he hoped would lead investigators to believe that his family had been murdered in an attack by drug-crazed intruders. The jury apparently accepted the prosecution's theory, for MacDonald was found guilty of first-degree murder of Kristen MacDonald.

The government theorized from drops of MacDonald's blood found in the master bedroom sink beneath the mirror and the presence of scalpel blades in a nearby linen closet that MacDonald's wounds had been self-inflicted. MacDonald's wounds were for the most part superficial, and his treating physician termed his vital signs "very acceptable." *Id.* at 2855. Although he did sustain a fifteen to twenty percent pneumothorax (a partially collapsed lung), the prosecution hypothesized that he could have used the scalpel blades to inflict this wound and had in fact observed another physician treating a similar wound a short time before the murders. *Id.* at 2866-67. These facts led to the conclusion that MacDonald had wounded himself but not so severly as to put his life in jeopardy.

Finally, the government buttressed its theory with evidence which showed that MacDonald's latent fingerprints were found on an Esquire magazine which contained an article about the celebrated murders committed by Charles Manson and his cult. *Id.* at 3136-37. The magazine was found pinned under the edge of a coffee table in the living room of the apartment and it was also stained with a mixture of Colette and Kimberly MacDonald's blood. The prosecution argued from this evidence that MacDonald had probably read the article sometime before the murders and had perhaps referred to it on that night to help him stage the crime scene in such a manner that it would appear that a similar drug crazed cult had murdered his family.

8. The Absence of Physical Evidence Consistent With MacDonald's Account of the Murders

MacDonald's account of the murders found little, if any, support from the physical evidence gathered by investigators at the crime scene. There were no threads, yarns, splinters, or blood, except on the Esquire magazine, found in the living room, the area where MacDonald said he struggled with the intruders. Although approximately seventy different medicines were found in the hall linen closet, the "intruders" did not take any of the drugs nor did they ransack the family's closets because the clothes in these closets were undisturbed. Similarly, although MacDonald had claimed that he was attacked by club-wielding assailants who stabbed at him while his pajama top was wrapped about his hands, he sustained only very limited injuries and, most importantly, no head wounds nor icepick wounds on his hands. Furthermore, despite MacDonald's contention over the years that four people which he later identified in some detail had been the assailants on the night of the murders, none of their fingerprints were ever found in the apartment.

The foregoing is but a brief summary of the more significant physical and circumstantial evidence, and the conclusions drawn therefrom, which the prosecution submitted against MacDonald at trial. There was also extensive expert testimony and a variety of other physical and circumstantial evidence pointing to MacDonald as the murderer. During the defense's presentation of its case, counsel for MacDonald repeatedly assailed as totally unprofessional the government's processing of the crime scene, the physical evidence, and the government's witnesses and theory of the case. The jury, however, apparently concluded that the prosecution's

case was convincing, for it returned a guilty verdict after only six hours of deliberation.[15]

B. The Stoeckley "Confessions"

At the foundation of MacDonald's motion for a new trial is his claim that after his trial in 1979, Helena Stoeckley gave a series of statements in which she voluntarily confessed in great detail to having participated in the murder of MacDonald's family. Since the night of the murders, MacDonald has maintained that his wife and two daughters were killed by two white males, a black male and a white female with blonde hair wearing a floppy hat, short skirt and boots. His accusations initially focused attention on Stoeckley, then a young woman about nineteen years old, because she resembled the description of the female intruder given by MacDonald. Stoeckley also lived near Fort Bragg and was associated with a group of drug-using military personnel, former military personnel and civilian men and women. An admitted heroin and opium addict in 1970, Stoeckley regularly used other drugs such as barbiturates, "angel dust," PCP (a horse tranquilizer), LSD (almost daily), THC (a marijuana derivative), hashish, marijuana and mescaline. From the day after the murders until her death on January 9, 1983, from bronchopneumonia complicated by cirrhosis of the liver, Stoeckley gave a seemingly unending series of statements concerning the murders, at times denying any knowledge of or participation in the crimes, and at other

15. The court has undertaken to recapitulate the record evidence for the sole purpose of providing background against which the defendant's newly discovered evidence must be assessed. The court again expressly disclaims any opinion as to the weight of the evidence or the merits of the conflicting theories of the prosecution and defense. Its duty at trial was simply to rule on the sufficiency of the evidence to be submitted to the jury and to sustain the jury's verdict. These rulings were upheld on appeal.

times fully confessing to having been a co-conspirator in their commission.

1. Stoeckley's Pre-trial Statements

On the day following the MacDonald murders, Fayetteville Detective Prince E. Beasley went to Helena Stoeckley's apartment to question her about the crimes. Beasley testified at trial that upon questioning her about her whereabouts on the night of the murders, Stoeckley told him "[i]n my mind, it seems that I saw this thing happen" but, she said, "I was heavy on mescaline." Trial Tr. at 5741-42. Beasley further testified that following the murders Stoeckley exhibited some rather bizarre behavior; she dressed in black as if in mourning and bought a number of funeral wreaths which she placed in her front yard and on her front door. *Id.* at 5742-43.

Apparently because civilian and military investigators came to suspect from the physical evidence that MacDonald had murdered his family, they discontinued their investigation of Stoeckley for a short while. During the August, 1970, Article 32 hearings, however, attention again focused on Stoeckley as a suspect when several witnesses testified that she had told them she was unable to account for her actions on February 17, 1970 because she had taken so many drugs. The testimony of these witnesses and the recommendation of the hearing officer in charge of the Article 32 proceedings that Stoeckley be investigated prompted the CID to resume its search for evidence linking Stoeckley to the crimes.

Stoeckley moved to Nashville, Tennessee some time in late 1970 and there told two acquaintances of her possible involvement in the MacDonald case. In November, 1970, while she was ill with hepatitis and hysterical, she told her neighbor Jane Zillioux, that she could not return to Fayetteville because she was involved in murders there. She further told Zillioux that the victims were a woman and two small children and that she had disposed

of the clothes she had been wearing to sever her connection with the crimes. *Id.* at 5691-700. Stoeckley also admitted to her friend that she "had been a heavy drug user and when you are on drugs, you do funny things" but said she couldn't tell Zillioux more because she could not remember. She told a similar story, although in more scanty detail, to another Nashville acquaintance, Charles Underhill, in December, 1970. *Id.* at 5711-13.

The CID began to reinvestigate Stoeckley in December of 1970 when it assigned Agent Richard J. Mahon to investigate the possibility that Stoeckley had been involved in the murders. Mahon interviewed her during one of her visits to Fayetteville on December 29-30, 1970. Stoeckley refused to take a polygraph or be fingerprinted but told Mahon that she could not recall what happened on February 17, 1970 after 1:30 a.m. because she had taken so many drugs. Government's Response to Motion for New Trial, Appendix Vol. IV at 1-2.

While living in Nashville, Stoeckley wrote a letter to Detective Beasley, in which she said "Beasley, what does the CID want of me? I didn't murder anyone?!!" *Id.* at Ex. 1. Beasley thereafter accompanied Agent Mahon to Nashville where he interviewed Stoeckley about the murders on February 27-28, 1971. Stoeckley again told him that she could not remember anything that happened on the night of the murders but said that she had been having dreams which she thought may have indicated she had some knowledge of what happened that night. *Id.* at Ex. 2. She further stated that she was afraid that she had a mental block about what happened that night and thought MacDonald may have murdered his family.

Mahon also spoke with Stoeckley's parents on April 7, 1971 concerning their daughter's behavior after the crimes. Her parents said that their daughter had laughed and joked about an August, 1970 newspaper article suggesting that she was connected to the crimes, but that as

time went along and she thought more about it she began to have doubts about whether or not she might have been involved. They also noted that she needed constant praise and attention. From this interview with Stoeckley's parents, Mahon also learned that Stoeckley had been hospitalized at Womack Army Hospital on April 13-14, 1970. Reviewing the in-patient files at the hospital, Mahon found that Stoeckley had visited the hospital in an attempt to overcome her drug problems and psychiatric ward officials recommended that her parents take her to Chapel Hill for long-term psycholotherapy. *Id.* at Ex. 3.

In late April of 1971, CID Agent Robert Brisentine, an Army homicide investigator, interviewed Stoeckley in Nashville. She had expressed a willingness to submit to a polygraph examination but on the first day of the interview Brisentine found her so impaired from drugs that he refused to administer the test. She was able to tell him that she did not think that she had participated in the murders but may have been present when they were committed. She also indicated that she knew who had killed the family. The next day, however, she retracted her statements and said she had been lying about knowing who committed the murders. *Id.* at Ex. 4. Following this last interview, Stoeckley wrote a note to a friend of hers on the Nashville Police Department force in which she said: "*Please* believe I was *not* in that house!!! I really and truly don't know anything about the whole mess." *Id.* at Ex. 6.

Stoeckley's last statement of note about the crimes before trial came on April 26, 1971 when she was interviewed by Agent Mahon in Nashville. She once more denied any knowledge of the murders and repeatedly told Mahon that she was with Greg Mitchell until midnight on the night of the murders and had taken some mescaline which Mitchell gave her, got into a blue car by herself at her apartment around 1:00 a.m., and had driven to a bridge on the Cape Fear River where she

stayed for several hours until she returned to her apartment. Later in the interview, she admitted that this story was a lie and that she had only told it because Beasley had told her to "tell them anything just to get them off your back." *Id.* at 20-22.

Several conclusions can be reached from Stoeckley's pre-trial statements. It is clear from these statements that the only truly consistent account that she gave of her actions on February 17, 1970 was that she had taken so many drugs that day that she could not remember what she had done during the night or early morning. Furthermore, despite her anxiety over her whereabouts, she does not appear to have been the least bit reluctant to talk about the incident. Finally, her child-like affection for Prince Beasley enabled him to act as a middleman between her and investigators, a role Beasley continued to play until Stoeckley's death in 1983.

2. Stoeckley's Trial Testimony

Stoeckley did not again figure prominently in the case until it came on for trial in July of 1979. She was located during trial and the court granted the defense a full day to interview her concerning her testimony. Testifying before the jury on August 17, 1979, Stoeckley openly admitted her drug addiction in 1970 and said that she had participated in witchcraft rituals with some of her friends which involved a lighted candle and the killing of small animals, usually a cat, and the sprinkling of the animal's blood over a person or thing. Trial Tr. at 5542-47. Consistent with her pre-trial statements, Stoeckley testified that on the day before the murders she had injected heroin six or seven times and the last thing she remembered was taking some mescaline given to her by Greg Mitchell around midnight, approximately three hours before the murders. She told the jury that she could not remember what she did between that time

and around 4:30 a.m. the next morning when she returned to her apartment. *Id.* at 5553-57. Stoeckley also said that she had previously experienced similar drug-induced blackouts. *Id.* at 5662-63. Although she owned a floppy hat, blonde wig, and white boots in 1970, she stopped wearing the floppy hat and got rid of the wig and boots because people began to assume that she was a participant in the crimes and she became afraid since she did not have an alibi. *Id.* at 5602-04, 5652-53.[16] Although she was concerned about her lack of memory about what happened on the night of the murders and the circumstantial connection between her and the crimes, Stoeckley did not hesitate when asked whether she was involved and testified as follows:

> Blackburn: To your own knowledge, did you participate in the killings of the MacDonald family?
>
> Stoeckley: No, sir.
>
> Blackburn: How do you feel towards children?
>
> Stoeckley: I love children.
>
> Blackburn: Of your own personal knowledge, did you kill Colette MacDonald?
>
> Stoeckley: No, sir.
>
> Blackburn: How about Kristen?
>
> Stoeckley: No, sir.
>
> Blackburn: How about Kimberly?
>
> Stoeckley: No, sir.

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16. Stoeckley said that she threw her white boots in a trashcan because they might have connected her to the murders and because a heel came off one of the boots. Trial Tr. at 5603-04. This testimony contradicts MacDonald's claim in his motion to set aside convictions that the boots given by James Nance to CID agents belonged to Stoeckley and further undermines his argument that the government suppressed exculpatory evidence.

Blackburn: Did you try to kill Dr. MacDonald?

Stoeckley: No, sir.

Blackburn: Do you know who did?

Stoeckley: No, sir.

Blackburn: Do you recall ever being in the MacDonald apartment carrying a candle?

Stoeckley: No, sir.

* * * * *

Blackburn: Did you ever have occasion that you can specifically recall to go on Castle Drive by the MacDonald apartment?

Stoeckley: Not until after the murders.

Blackburn: Not until after the murders? Well, how long after—do you remember?

Stoeckley: About a year later.

Blackburn: About a year later? Why did you go back, if you recall?

Stoeckley: Just to see if anything would look familiar or jolt something in my memory or something.

Blackburn: To see if anything looked familiar? Did it?

Stoeckley: No, sir.

Blackburn: Did it jolt anything in your memory?

Stoeckley: No, sir.

Id. at 5647-50; *see id.* at 5579-83, 5613-32.

Read in its entirety, Stoeckley's trial testimony parallels her pre-trial statements. She told the jury, as she had told others before the trial, that she had taken so many drugs on the day before and night of the murders that her mind had become clouded and she could not

recall what she had done between around 12 o'clock that night and 4:30 a.m. Regardless of how much the defense or prosecution prompted her, she could not recognize any of the victims or any part of the crime scene. After Stoeckley's testimony, the defense sought to introduce the testimony of seven witnesses to whom Stoeckley had allegedly made statements implicating her in the murders but the court excluded the statements because the defense failed to sufficiently show that they were trustworthy when made and the testimony would only have served to confuse the jury. Trial Tr. 5906-10; *see* Rules 403 and 804(b)(3), F.R.Evid.; *United States v. MacDonald*, 485 F.Supp. 1087, 1091-94 (E.D.N.C. 1979), *aff'd*, 688 F.2d 224, 230-34 (4th Cir. 1982), *cert. denied*, ____ *U.S.* ____, 103 S.Ct. 726 (1983). The jury apparently believed that Stoeckley played no part in the murders for it returned a guilty verdict against MacDonald.

3. The Post-Trial "Confessions"

Following MacDonald's conviction and while his case was on appeal, a group of his associates retained Private Investigator Ted L. Gunderson in late 1979 to further investigate the case and especially, it appears, to interview Helena Stoeckley about her possible involvement in the murders. Evidentiary Hearing Tr., Vol. 1 at 101-03. Gunderson, a retired FBI special agent and former agent in charge of the agency's Los Angeles, Dallas and Memphis offices, then enlisted the support of Prince Beasley in the investigation, since he considered Beasley essential to securing Stoeckley's cooperation. *See id.* at 117.

Gunderson and Beasley first interviewed Ernest Leroy Davis whom Stoeckley had met just before trial

and married in April, 1980.[17] Defendant's Evidentiary Hearing Ex. 15 at 1-13. The couple lived in South Carolina until August of 1980 when they moved to Fayetteville and lived for a few days with a friend of Stoeckley's. *Id.* at 9-11. While staying with her friend, Stoeckley began fighting with Davis and on August 10, 1980, she took out an arrest warrant charging him with assault. *Id.* at 11.

Prince Beasley somehow learned about the outstanding warrant for Davis' arrest and, seizing upon the opportunity, located Davis in September, 1980, and told the Fayetteville Police Department where he could be found and arrested. Beasley then secured Davis' cooperation by agreeing to post bond for him in exchange for his agreement to accompany Beasley to California and tell all he knew about the MacDonald murders. Beasley and Davis then flew to Los Angeles, California, where Davis gave a lengthy statement to Gunderson and Beasley on September 30-October 1, 1980. At the conclusion of his statement, he told Gunderson and Beasley that he would do his best to get his wife to talk to them but cautioned them that if they ever told her he had given a statement she would not cooperate.[18] *Id.* at 181-84.

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17. The court will refer to Helena Stoeckley by her maiden name throughout the decision since she used a variety of aliases during her interviews with Gunderson and Beasley.

18. Davis later told FBI agents that Gunderson and Beasley had told him that in return for his statement they would try to relocate him and Stoeckley and give them new identities. Government's Response to Motion for New Trial, Appendix Vol. II, Ex. O at 12. He also told the agents that Gunderson and Beasley had told him that the reason they were interviewing him was to gather information for a book and movie about the case. *Id.* at 13. The FBI agents showed Davis a copy of the statement he had made to Gunderson and Beasley and after having read it, Davis said that some of the information in the statement was true but that other information was either false or different from what he had told Gunderson and Beasley. *Id.* at 13-14. These revelations cast considerable doubt on the veracity of Davis' September 30 and October 1, 1980 statements.

Although Davis still had an assault charge pending against him when he returned to North Carolina, he and Stoeckley left Fayetteville and went back to South Carolina. When Davis failed to appear in court on his assault charge, Beasley traveled to his home in South Carolina on October 21, 1980 where he arrested Davis. Evidentiary Hearing Tr., Vol. 2 at 42. Stoeckley was with Davis when Beasley arrested him and accepted Beasley's offer to ride back to Fayetteville with her husband. On the way to Fayetteville, Stoeckley and Davis began arguing and she learned during the course of their argument that Davis had gone to California and had given a statement to Gunderson and Beasley. Apparently unhappy at this secondhand account of her activities on the night of the murders, Stoeckley told Beasley that she was ready to tell him everything she knew about the MacDonald case. Evidentiary Hearing Tr., Vol. 2 at 49-51.

After Beasley and Stoeckley had dropped Davis off at the Fayetteville Police Department, they checked into the Bordeaux Motor Inn where at 11:45 p.m. that night Stoeckley gave to Beasley what was to be the first of a series of "confessions" to having been present during the MacDonald murders. Defendant's Evidentiary Hearing Exhibit 21. She and Beasley flew to California but upon being confronted with Gunderson as an interviewer, she told the investigators that she could not remember what happened that night. *Id.* at Exhibit 16. Stoeckley experienced a miraculous recovery of her memory the following day, however, and between October 24-25, 1980 gave fairly detailed confessions to the MacDonald murders.[19] *Id.* at Exhibit 2.

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19. Homer Young, a retired FBI special agent, was working with Gunderson and Beasley when Helena Stoeckley was interviewed in Los Angeles in October of 1980. In his affidavit of July 3, 1984, Young states that Gunderson and Beasley interviewed Stoeckley for hours upon hours, day after day, the entire time she was in Los Angeles, California, and that based upon his professional experience, "there was an element of duress present [during the

Stoeckley again "confessed" to Beasley and Gunderson in Los Angeles on December 4-5, 1980. Defendant's Evidentiary Hearing Exhibits 6, 8, 17 and 19. She later returned to North Carolina with Beasley and went with him to the crime scene at 544 Castle Drive to view the exterior of the MacDonald apartment and thereafter gave a statement in which she says viewing the scene helped her to remember that she entered by the kitchen door of the apartment on the night of the murders and left by the utility room door.

The flurry of confessions by Stoeckley continued in early 1981 when she gave statements to Fred Bost, a Fayetteville newspaper reporter, on January 2, 1981 and February 6, 1981. The statements covered essentially the same ground as earlier statements and were given pursuant to an agreement with Bost under which he was to write a book on the case and she would receive a portion of the proceeds. Evidentiary Hearing Tr., Vol. 1 at 45-49.

On July 30, 1981, Stoeckley wrote Gunderson a letter in which she said:

> In all fairness to any person or persons involved in the investigation of the Jeffrey MacDonald murder case in 1970 at Fort Bragg, North Carolina, I feel that it is my moral obligation to inform you that my husband and I are in the process of immediate relocation. It is my opinion that in the preceding months I have been used as a pawn for your convenience and I also feel that in December of 1980 I was coerced into signing a so-called confession and that I was

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interviews] and I further believe that Gunderson used unethical means and tactics on a very important case." Government's Response to Motion for New Trial, Appendix Vol. II, Ex. B at 4. Similar heavy-handed methods were used on Ernest Davis during his visit to California. *Id.* at 2-3. Assuming Young's allegations are correct, such tactics can only serve to call into question the voluntariness and truth of Stoeckley's confessions despite her statements to the contrary.

> exploited by means of false hopes and empty promises.
>
> Never have I seen a bigger mockery made of justice or such a shamble made of an investigation.
>
> * * * * *
>
> When I finally agreed to cooperate with you, I thought I was doing what was morally right. I would also be freeing myself from a private hell. So I gave you as conclusive a review of the events of the night in question as I could. You, in turn, misconstrued and distorted all statements made to you to be used against me at your convenience.
>
> * * * * *

Evidentiary Hearing Tr., Vol. 1 at 91, 122-24.[20]

Some three months later, on September 9, 1981, FBI agents went to Stoeckley's home in South Carolina and interviewed her in the presence of Ernest Davis. Stoeckley furnished investigators with a written statement disclaiming her October and December confessions to Gunderson and Beasley saying that

> [t]hese statements are basically accurate; however, the statements and the facts of the statements are what I think happened or dreamed and are not a positive recollection of events on February 16-17, 1970. The fact remains and the truth of the matter is that I do not actually know where I was during the early morning hours of February 17, 1970 and I do not know if I was present or participated in the MacDonald murders."

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20. This letter was read into the record at the evidentiary hearing but was never admitted as an exhibit even though it was marked by the Clerk for identification purposes. *See* Evidentiary Hearing Tr., Vol. 1 at 91.

Government's Response to Motion for New Trial, Appendix Vol. I at Ex. D.

Obviously distressed at this turn of events, Gunderson and Beasley went to see Stoeckley at her home where they again interviewed her between May 20-24, 1982. Stoeckley, then pregnant, reinstated her confession but added that she was afraid to give names because she and her unborn child had been threatened by cult members. Significantly, Stoeckley also said that she had been in the MacDonald apartment three and one-half weeks before the murders for about fifteen minutes and had stolen a bracelet with a blue stone setting; three other cult members had been in the apartment on different occasions; and one cult member had talked to MacDonald in his apartment for about an hour and a half two weeks before the murders trying to get MacDonald to cooperate in treating drug addicts. *See* Evidentiary Hearing Tr., Vol. 1 at 183-84; Defendant's Evidentiary Hearing Ex. 18 at 183-85; 193-201. As far as the court can determine, MacDonald has never claimed that his apartment had been broken into immediately before the murders or that he talked with anyone in his home concerning drugs before the murders and there is no evidence in the record to suggest that these events took place.

Stoeckley's last statement on the MacDonald case came three days later on May 27, 1982 when she accompanied Gunderson and Beasley to New York City where she was interviewed for the television program "60 Minutes." She once more "confessed" to being at the MacDonald apartment on the night of the murders but refused to name who actually killed the family unless she was granted immunity from prosecution. Defendant's Evidentiary Hearing Ex. 13. Stoeckley apparently gave no other interviews or statements about the case between the May 27, 1982 taping and her death on January 9, 1983.

Viewed in the light most favorable to MacDonald, Stoeckley's statements provide the following explanation for the murders:[21]

Stoeckley was a member of a satanic cult which was angry with military physicians, MacDonald among them, because they refused to help drug users with their problems. The leaders of the cult decided to approach MacDonald in an attempt to obtain drugs from him and persuade him to treat drug addicts.

Stoeckley was assigned responsibility for determining the whereabouts of Colette MacDonald on the night of February 16, 1970 and made a pretext telephone call to the MacDonald residence at about 6:30 p.m. that evening and learned that Colette would be attending school at a North Carolina State University Extension at Fort Bragg that evening. She and several other members of the cult later went to the North Carolina State University Extension and spoke with her in an unsuccessful attempt to persuade her to talk to her husband about the cult's concerns.

Later that evening, at approximately 10:30 p.m., Stoeckley, Greg Mitchell, Shelby Don Harris, Bruce Fowler, and Dwight Edwin Smith met at Stoeckley's apartment where they discussed their plans to go to MacDonald's apartment to seek his cooperation. Stoeckley thereafter took some mescaline offered to her by Greg Mitchell and the group went to two local restaurants where they stayed until the restaurants closed.

The Stoeckley group left a Dunkin Donuts restaurant at about 2:00 a.m. and drove to the MacDonald residence. Bruce Fowler then parked the car nearby and the group walked along the sidewalk to the rear of

21. The statements contain numerous inconsistencies rendering it almost impossible to reconcile them into one cohesive statement of events. Giving MacDonald the benefit of all doubts, however, the court has chosen to recite in large part what MacDonald claims Stoeckley's statements prove occurred on the night of the murders and thereafter.

MacDonald's apartment and entered the home through a utility room door. It was dark inside the house and Stoeckley lit a candle to help the group find their way. They walked through the house and into the living room where they found MacDonald asleep on the living room couch with a book across his chest and a Valentine's Day card on the couch next to him. Stoeckley noticed that the television was on but there was no picture because there was no programming that late.

Some members of the group shook MacDonald to awaken him so that they could talk to him about drugs but upon awakening he became excited and began to fight with them. During the fight, Stoeckley chanted "acid is groovy; kill the pigs." When the group finally subdued MacDonald, they told him that they wanted drugs and he agreed to call a friend of his to see if he could get some. He went to a wall telephone in the kitchen but instead of calling his friend, he attempted to call the military police. The group overheard the conversation and again assaulted MacDonald, this time knocking him unconscious.

According to Stoeckley, things "got out of control" at this point and she heard Colette MacDonald calling to her husband for help from the master bedroom. Stoeckley went to the room where she saw Colette being assaulted by Greg Mitchell and another member of the group. She noted that one of the MacDonald children was in the master bedroom with her mother but appeared to be asleep. Stoeckley left the master bedroom and went into one of the children's bedrooms where she saw a record player, some books and a hobby horse which she noted was broken. She then heard the sound of running water in a bathroom and looked in to see Greg Mitchell washing his hands at the sink.

Stoeckley then heard a telephone ring and another member of the group told her to answer it. She answered the telephone and heard a soft voice ask for "Dr.

MacDonald" whereupon she began to laugh until someone in the group ordered her to hang up the telephone. The group became scared and left in a hurry, leaving all of the murder weapons behind except for a pair of scissors.[22]

After leaving MacDonald's apartment, the group went to a Dunkin Donuts where Stoeckley went inside and washed her hands. She was eventually taken home at about 4:30 a.m. When asked by her roommate a few days after the murders why she had participated in the crimes, Stoeckley told her roommate that the MacDonalds deserved to die. She disposed of her floppy hat which she had been wearing during the murders and gave her blood-stained clothes and boots, which she had also worn, to a friend of hers, Cathy Perry. She told Perry to dispose of all of these items. The members of her cult eventually moved away from the Fayetteville, North Carolina area and lost contact with each other.

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22. In his affidavit attached to MacDonald's motion for new trial, Ernest Davis claims that Stoeckley told him that all the murder weapons had been left at the MacDonald apartment except a pair of scissors. Motion for New Trial, Declaration of Ernest Leroy Davis at 3. MacDonald argues that this statement proves the existence of a missing murder weapon and submits the February 15, 1984 declaration of Dr. Ronald K. Wright in support of this theory. *Id.* at Declaration of Ronald K. Wright, M.D. After reviewing the autopsy protocols and photographs of Colette, Kimberly and Kristen MacDonald, Dr. Wright was of the opinion that "at least 6 of the puncture wounds on Mrs. MacDonald's chest might have been inflicted by scissors" and "a number of the puncture wounds on the front of [Kristen's] body are consistent with scissors." *Id.* The court accords no weight to MacDonald's argument, however, because Dr. Wright subsequently explained on May 9, 1984 that "he [was] not saying [on February 15, 1984] that the wounds could not have been made by an icepick. In fact, the wounds on Kristen look more like icepick wounds . . . than scissor wounds." Government's Response to Motion for New Trial, Ex. Q at 3-4.

Called to testify at MacDonald's trial nine years later, Stoeckley perjured herself in order to escape prosecution. She eventually decided to confess to the crimes to clear her conscience.

This summary of Stoeckley's "confessions" does not fully reveal the contradictions and inaccuracies that predominate the statements. Not only does the size and composition of Stoeckley's group on the night of the murders vary from statement to statement, her certainty about whether the events took place at all changes depending upon whether she is talking to MacDonald's investigators or to the FBI. For instance, she states on several occasions that Allen Mazerolle was with the group on the night of the murders but prison records confirm that he was in jail from January 29, 1970 to March 10, 1970. *See* Defendant's Evidentiary Hearing Ex. 2, 3 and 8; Government's Response to Motion for New Trial, Appendix Vol. I, Ex. B at 13-16. Similarly, her claim that members of the group talked to MacDonald for almost eight minutes after having awakened him in an attempt to obtain drugs is inconsistent with MacDonald's version of events because he has never said that such a discussion took place. *See* Defendant's Evidentiary Hearing Ex. 2 and 3. As noted earlier, Stoeckley also recalls going into MacDonald's apartment herself before the murders and stealing a bracelet with a blue stone setting and other members of the cult breaking into the apartment on other occasions but these events are totally unsubstantiated by any evidence offered by MacDonald. *See id*, Ex. 18 at 183-85, 193-201. Her attempt to explain away her statements about Mazerolle being involved in the murders by saying that she included him in her story as a means of discrediting her confessions to protect herself if she did not receive immunity, and MacDonald's explanation that his failure to remember the eight-minute discussion he had with members of the cult was caused by retrograde amnesia, are unconvincing. Motion for New Trial at Footnotes 2

and 3. More importantly, no physical evidence was uncovered at the crime scene which would support Stoeckley's confessions. To the contrary, the physical evidence, so the government contends, consistently pointed towards MacDonald as the murderer.

4. The Credibility of the Stoeckley "Confessions"

Aside from the inaccuracies and contradictions which become apparent upon reading Stoeckley's confessions together and against MacDonald's account of the murders and the physical evidence, the government has submitted the affidavits of witnesses who further discredit Stoeckley's story. A friend of Stoeckley's, Margaret Mauney, recalls lending her blue 1968 Chevrolet Corvair to Stoeckley on the evening of February 16, 1970. Government's Response to Motion for New Trial, Appendix Vol. I at Ex. A. According to one of Stoeckley's roommates, Diane Hedden Cazares, Stoeckley drove Cazares and Kathy Smith to the Village Shoppe in Fayetteville around 8:00 or 9:00 p.m. the same evening. *Id.*, Appendix Vol. IV at Ex. 10. After dropping Cazares and Smith off at the Village Shoppe, Stoeckley went to visit her parents who remember her coming home and complaining that she did not want to be around her apartment because her girlfriends were painting the bathroom at the apartment. *Id.*, Affidavit of Richard J. Mahon at 14. Mr. and Mrs. Stoeckley say Helena did not stay with them long that night, leaving by herself at around 10:00 or 10:30 p.m.

Diane Cazares remembers Stoeckley returning to the Village Shoppe with Greg Mitchell shortly before 11:00 p.m. *Id.*, Appendix Vol. IV at Ex. 10. Where Stoeckley went after she left the Village Shoppe and what she did between 11:00 p.m. when Diane Cazares last saw her and 4:00 a.m. the next morning when she returned to her apartment is not known, but the record does reflect affidavits concerning the whereabouts of the

other people Stoeckley says went with her to the MacDonald apartment. Shelby Don Harris was with Diane Cazares at her apartment while she was painting the bathroom until about 5:00 a.m. the next morning and Bruce Fowler was with Kathy Smith at her trailer until late in the morning of February 17, 1970. *Id.* at Ex. 9, 10. Dwight Edwin Smith does not recall where he was on February 16-17, 1970 but denies any participation in or knowledge of the murders. *Id.*, Appendix Vol. I at Ex. X. Greg Mitchell also did not recall where he was on the night of the murders. He denies being with Stoeckley that night but cannot remember for certain whether he had gone out or was at home with his parents. *Id.* at Ex. W; Government's Response to Motion to Set Aside Conviction, Ex. D at Attachment 4.

The affidavits of these witnesses account for Helena Stoeckley's whereabouts on the night of the murders except for the period between 11:00 p.m. until 4:00 a.m. It seems likely that despite Mitchell's statement to the contrary, he and Stoeckley, who were dating in early 1970, went somewhere alone for the few hours between the time Diane Cazares last saw them and the time Stoeckley returned to her apartment early the next morning. Whether or not Stoeckley and Mitchell were together during this time, the affidavits of the witnesses who saw Stoeckley that night and were with members of the group whom Stoeckley claims committed the murders directly contradict the substance of her confessions, thereby diminishing their credibility.

It is within the province of the court when ruling on a motion for new trial based upon newly discovered evidence to examine the credibility of those individuals who give statements in support of the motion.[23] *See*

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23. The issue of Stoeckley's credibility was first raised by MacDonald in his motion for new trial when he introduced the affidavit of a psychologist, Dr. Rex Julian Beaber, to show that Stoeckley was a reliable affiant. *See* Motion for New Trial, Declaration of Rex Julian Beaber, Ph.D.; Addendum II to Reply to

United States v. Johnson, 327 U.S. 106, 112 (1946); *United States v. Jackson*, 579 F.2d 553, 558 (10th Cir. 1978); *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973); *United States v. Gantt*, 298 F.2d 21, 21-23 (4th Cir. 1962). Helena Stoeckley testified before the court at trial and the court has reviewed her statements, the affidavits relating to her, and the videotape supplied by MacDonald of a television program featuring her, all of which lead the court to the conclusion that this woman is not reliable.

The court's conclusion that Stoeckley is not a reliable confessor should not be construed to mean necessarily that she was not telling what she believed to be the truth when she confessed to the MacDonald murders. From the very beginning, she said that she could not remember what she had done on that night because she had taken so many drugs. Based upon MacDonald's account of the murders, the Fayetteville police, military police and the FBI investigated members of the drug culture in Fayetteville and Stoeckley, quite understandably, became anxious because she could not recall where she was during the crimes. This anxiety, her drug-induced state of confusion, and the observations of her friend and Detective Beasley that she met the description of the woman involved in the murders led Stoeckley to believe that she might have participated in them but had a mental block about the night which prevented her from recalling details.

NOTES *(Continued)*

Government's Opposition to Motion for New Trial, Declaration of Rex Julian Beaber, Ph.D. Dr. Beaber is of the opinion that Stoeckley "was capable of ordinary perception, recollection and cognition and that [she] understood the difference between truth and falsity." Addendum II to Reply to Government's Opposition to Motion for New Trial, Affidavit of Rex Julian Beaber, Ph.D. at 2. The opinion of Dr. Beaber, derived from his four-to-six hour examination of Stoeckley on December 7, 1980 is entitled to some weight but the court also recognizes that the government is precluded by Stoeckley's death from having her examined by a psychologist of its choosing.

Stoeckley's uncertainty and the relentless attention the case focused upon her undoubtedly tortured her over the years. Her drug abuse of the late 1960's and early 1970's gave way to alcohol abuse in the late 1970's which contributed to her premature death in 1983. The confluence of her drug and alcohol abuse and uncertainty over her role in the crimes appears to have ultimately led her to believe that she was involved and to piece together her fragmented memory of 1970 into an explanation which MacDonald says amounts to a confession. Whether this was done innocently or by design to gain the attention which she craved is unclear from the record. What is clear is that considering all of the circumstances, neither Stoeckley nor her "confessions" are reliable. Thus, although the inconsistencies in Stoeckley's confessions and contradictions of the statements by the facts of the case and the affidavits of other witnesses would be more than enough to lead the court to conclude that the confessions are untrue, Stoeckley's unreliability adds even greater force to this conclusion.

5. Statements of Other Witnesses Corroborating Stoeckley's "Confessions"

Attached to MacDonald's motion for a new trial are the affidavits of some two dozen witnesses who appear to corroborate various aspects of Stoeckley's statements. At least four witnesses, Keith Bowen, Gary Mitchell, Deborah Lee Harmon, and Shelby Don Harris, recall that Stoeckley associated with Greg Mitchell, Dwight Edwin Smith, Harris and others while she was living in Fayetteville in 1970. Mable Campbell and John Humphries claim that they saw Stoeckley and her associates gather on the evening of the murders and that the group appeared high on drugs and acted rather strange. Still other witnesses, Frankie Bushey and Marian Campbell among them, place the group in the Fort Bragg area at about 1:30 a.m. on February 17, 1970. Joe

Greene Sonderson, Addie Willis Johnstone, and Dorothy Averitt also support Stoeckley's statements by saying they saw members of the Stoeckley group together in the hours following the murders. MacDonald offers these affidavits to prove that Stoeckley's account of the events surrounding the murders is accurate.

If the statements of these witnesses are true, the net effect of them all would only be to place Stoeckley and her friends in Fayetteville at locations close to where she and other members of the group lived in 1970. The court does not doubt that members of the group frequently gathered at the named restaurants late at night. Nevertheless, this is only very weak circumstantial evidence proving that Stoeckley and her group were in the general Fort Bragg area at about the time of the murders.

Former Fayetteville detective Prince Beasley figures prominently in MacDonald's motion for a new trial because of his relationship to Helena Stoeckley. Stoeckley worked for Beasley as an informant in Fayetteville in 1970 and their friendship appears to have lasted until the time of Stoeckley's death. The court's impression from the record is that Stoeckley looked up to Beasley and Beasley gave her the attention which she seems to have at times sought. At all stages of the case, the defense has obtained information from Stoeckley by using Beasley as its contact with her.

Beasley has given a series of statements, trial testimony and affidavits over the years which substantiate Stoeckley's involvement in the crimes. These statements have rarely been accurate. Upon hearing Beasley's *voir dire* testimony at trial to the effect that he had stopped Stoeckley and several of her male companions for about an hour on the morning of the murders and then let them go when CID agents did not arrive on the scene, this court noted that

> [i]f it is within the province of this court to pass on the trustworthiness of a witness who proposes to testify . . . this court would be constrained to hold Officer Beasley's testimony to be unreliable. It is simply incredible that any self-respecting, competent police officer, who really thought that he had a substantial lead toward solving these sensational murders would allow the suspects to go after waiting only an hour for the Army investigators . . .

United States v. MacDonald, 485 F.Supp. at 1092.

The court's evaluation of the trustworthiness of Beasley in 1979 is left unchanged by his most recent statements and the court's observation of the demeanor of this witness during the evidentiary hearing on the post-trial motions. While the court does not believe this seriously ill man to be lying, medical records introduced by the prosecution clearly show that he cannot consistently distinguish fact from fiction. *See* Government's Evidentiary Hearing Ex. 23-26. For this reason, the court attaches no significance to Beasley's statements and concludes that they are insufficient to corroborate Stoeckley's "confessions."

MacDonald next claims that the affidavit of Edith Boushey, a former English teacher and coordinator of the Modern Language program at the North Carolina University Extension program at Fort Bragg, North Carolina, corroborates Stoeckley's statement that she went to the Extension campus on the night of February 16, 1970 to talk to Colette MacDonald. Boushey recalls that at about 9:40 p.m. on that night, she was walking past a group of people in the stairwell of a building on campus and one member of the group, whom she identified as Greg Mitchell, was talking to Colette MacDonald. Motion for New Trial, Declaration of Edith Boushey. According to Boushey, as she walked by Colette, she heard Mitchell saying, "If you go along I

think it will be all right." She then heard a part of Colette MacDonald's response in which she said, "I dread . . . " *Id.* at 2. Mrs. Boushey says that the group in the stairwell included at least three other women, two of whom were wearing floppy hats.

Mrs. Boushey's account of the meeting between MacDonald's wife and members of the Stoeckley group is directly contradicted by the affidavit of Elizabeth Ramage, the friend of Colette MacDonald who accompanied her to class on the evening of February 16, 1970 and was with her until Colette dropped her off on the way home from class. Mrs. Ramage states that she was with Colette at all times during class and left with her between 9:20 and 9:30 p.m., some ten minutes before Mrs. Boushey said the meeting between Colette and Greg Mitchell took place. Government's Response to Motion for New Trial, Appendix Vo. II at Ex. D. She remembers nothing unusual happening that night, either during or after class.

Mrs. Boushey's statement only loosely parallels Stoeckley's version of the meetings and a review of the following portion of Stoeckley's May 24, 1982 statement to Gunderson reveals that Stoeckley herself was unclear about the details of the incident or whether it actually took place:

> Gunderson: Go on back to Colette that night — the night of the murders. She attended an extension course at one of the schools in the Fayetteville area — maybe it was Fort Bragg, I am not sure. Did any of the members of your cult talk to her in the hallway that night at the school?
>
> Stoeckley: One member ran into Colette, but it wasn't at school, it was before she got there.
>
> Gunderson: Tell us about that.
>
> Stoeckley: I don't know where or anything else, I just know they ran into her early that evening, before they said for me to call because they wanted to

make sure she was going to take the course that evening.

Gunderson: Just before your call? Did this member talk to Colette?

Stoeckley: No.

Gunderson: Just saw her?

Stoeckley: They just saw her.

Gunderson: Was Sheila Hamby the person who, with some male hippies, met Colette in the hall at the school the night of the murders?

Stoeckley: Yes.

Gunderson: Why? What was discussed?

Stoeckley: I don't want to talk about it.

Gunderson: Who accompanied Sheila to the school?

Stoeckley: I don't want to talk about it.

Gunderson: Will you identify them?

Stoeckley: No.

Gunderson: How many were there?

Stoeckley: Two men.

Defendant's Evidentiary Hearing Ex. 12 at 25-26. Not only are Stoeckley's May 24, 1982 statements about the meeting sketchy, she said that the group which went to the University consisted of two males and a female but Mrs. Boushey remembers that there were at least three females and one male whom she saw in the hallway. This inconsistency makes it impossible to reconcile Boushey's statement with Stoeckley's.

In view of the affidavit of Elizabeth Ramage and the inconsistency between Stoeckley and Mrs. Boushey's accounts of the February 16, 1970 meeting, the court can only conclude that either Mrs. Boushey's memory of the

events of that evening is faulty or she is mistaken about the two people in the hallway being Colette MacDonald and Greg Mitchell. The court finds, therefore, that Mrs. Boushey's affidavit is of no corroborative value.

Neither can the court find that the affidavit of Carlos Torres proves that the Stoeckley group was in the MacDonald apartment on the morning of February 17, 1970. Torres testified at the evidentiary hearing that he was stationed at Fort Bragg, North Carolina, in February of 1970 and was working part-time at the post NCO club. Evidentiary Hearing Tr. Vol. 1 at 65. Torres left the club about 2:00 a.m. and proceeded up Bragg Boulevard until he stopped at a stoplight near Castle Drive. While stopped at the light, he noticed a blue 1962 or 1964 Volkswagen stationwagon parked on the side of the rode. *Id.* at 66-69. He observed one person in the van, one outside the van, and two other people walking toward the van from a wooded area but was unable to identify any of the four people.

Torres' statement is inconsistent with Stoeckley's confessions in which she says the blue car the group was riding in on the night of the murders was a Ford Mustang, not a Volkswagen van. The two vehicles are in no respects similar. Furthermore, as he admitted on cross-examination, Torres had just returned from Viet Nam in early 1970, was in the process of a divorce, and, in his own words, "wasn't in a condition to reveal this and get any more nervous and attention." *Id.* at 73. Under these circumstances, the court finds that Torres' testimony is not credible as corroboration for Stoeckley.

The court has also reviewed the other affidavits which MacDonald filed in support of Stoeckley's confessions. These affidavits, like those previously discussed, suffer from either factual inaccuracies or contradictions which render them of no use to MacDonald in proving that Stoeckley and her group committed the murders.

C. The Confessions of Greg Mitchell

Stoeckley implicated her good friend Greg Mitchell in her confessions by alleging that he was with her in the MacDonald apartment and was responsible, at least in part, for killing Colette MacDonald. *See* Evidentiary Hearing Ex. 2 and 3. MacDonald now claims to have newly discovered evidence which shows Mitchell confessed to the murders and expert testimony proving that Colette MacDonald was struck by a club wielded by a person who, like Mitchell, was left-handed.

Sometime in early March of 1971, a man fitting Mitchell's description appeared at "The Manor," a church-affiliated house providing counseling to young people with alcohol or drug problems. Later in the week during a prayer session, the man told Ann Sutton Cannaday that he was part of a cult in Fayetteville and that he had murdered people. Motion for New Trial, Declaration of Ann Sutton Cannaday. The man left the following day after having stolen clothes belonging to Reverend Randy Phillips. *Id*; Declaration of Randy Phillips.

Following the departure of the man resembling Mitchell, Cannaday and Juanita Sisneros went with Phillips to a farmhouse owned by The Manor which was being repaired for use as another counseling center. Upon arriving at the farmhouse, the group saw two people running away from the house towards a wooded area. Cannaday and Sisneros went into the house and in one of the bedrooms found written in bright red paint on a wall "I killed MacDonald's wife and children."[24] *Id.* at Declaration of Ann Sutton Cannaday; Declaration of Juanita Sisneros. They told Reverend Phillips what they had seen and planned to return later to photograph the wall.

24. Cannaday also says that they called a deputy sheriff who went with them on their tour of the house. No affidavit from this law enforcement officer appears in the record and he is not mentioned by either Reverend Phillips or Sisneros.

When they went back to the farmhouse later in the week, someone had painted over the wall.

Mitchell lived in Charlotte, North Carolina, in the 1970's and became friends with Norma and Bryant Lane. The Lanes recall an incident in 1977 when Mitchell came to their house and seemed depressed and told them after they asked him what was wrong that something was bothering him that was too horrible to talk about. In 1982, Mitchell again told them that something had happened while he was in the service and if anyone found out about it he would have to leave the country. Addendum to Motion for New Trial, Declarations of Norma Lane and Bryant Lane. Mitchell died soon thereafter at the age of 31 of cardiopulmonary arrest and alcoholic liver disease. Government's Response to Motion for New Trial, Appendix Vol. I, Ex. F. at Attachment 1.

Little can be said for sure about the evidence offered by MacDonald to show Mitchell's involvement in the murders except that it is at best speculative and circumstantial. Neither Cannaday, Sisneros nor Reverend Phillips personally knew Mitchell and only Cannaday heard the statement by a young man to the effect that he had "murdered people." Granted, Cannaday would have no reason to lie but when viewed against the evidence discussed relative to the Stoeckley confessions, the court cannot accept this one statement to Cannaday over fourteen years ago by a man she did not know as evidence of any substance that Greg Mitchell confessed to the MacDonald murders. Similary, the fact that two unidentified men were seen running from a farmhouse which had been vandalized is only weakly connected to Mitchell if he was indeed the young man who stayed at The Manor. The affidavits of the Lanes are equally unpersuasive because Mitchell made no specific reference to having been involved in the MacDonald slayings and voluntarily appeared at the Charlotte, North Carolina office of the FBI in late 1981 where he denied any

knowledge of the murders. Government's Response to Motion for New Trial, Appendix Vol. I at V. Absent a stronger showing, these affidavits are insufficient to prove Mitchell was in the MacDonald apartment on February 17, 1970.

Finally, MacDonald offers the affidavit of Dr. Ronald K. Wright who on February 15, 1984 after reviewing records and photographs relating to the case, said that he was of the opinion that

> based upon the location of the injuries suffered by Colette MacDonald and the nature of those injuries . . . the blow which fractured Colette MacDonald's skull was struck with a club that was in a left-handed swing by a person facing Mrs. MacDonald at the time she was standing [and because] the blow was very forceful I have concluded that it is consistent with some one who was lefthanded.

Motion for New Trial, Declaration of Ronald K. Wright, M.D. Dr. Wright's statement is of no evidentiary value, however, because as he later admitted on September 4, 1984,

> [i]ndividuals intoxicated with psychomimetic drugs or enraged by their wife cannot be presumed to strike with their handed side. Therefore, while perhaps slightly more often forceful blows delivered from a deceased's right to left are delivered by lefthanded folk (adjusting for their minority status); it is certainly not unusual to see such a blow delivered by a righthanded individual.

Government's Response to Motion for New Trial, Appendix Vol. III at Ex. E.

The court has reviewed the other evidence and arguments submitted by MacDonald in support of his contention that Mitchell confessed to these murders and

finds them to be without merit. Mitchell, like Stoeckley, may have been tormented by accusations that he was involved in the murders but the court is unable to conclude from the evidence submitted that there is any real likelihood that he was involved.

D. The Confession of Cathy Perry Williams.

The last confession offered by MacDonald is one by Cathy Perry Williams. Williams, it will be remembered, was the friend of Stoeckley's whom MacDonald claims had possession of the white boots which were turned over to the CID in 1971.

On November 17, 1984, Williams gave a statement to an FBI agent in which she said that she was standing outside of a "head shop" in Fayetteville on the evening of February 16, 1970 when two white females and five or six white males came by in a white stationwagon and talked her into getting into the car with them. She said that after she got in they would not let her get out and they took her with them to a house which the group broke into through the front door. In pertinent part, the remainder of Williams' statement about this incident as told to the FBI agent is as follows:

> When they entered the house a white/male was lying on a couch. [WILLIAMS] indicated that one in the group shot him up with some kind of narcotic and he collapsed. She said the rest of them sat around and said that they wanted to come to this place to get high. WILLIAMS said she tried to leave but they would not let her leave, and they forced her to take a pill.
>
> Another male in the group whom WILLIAMS described as blonde headed and fat said that the man who lived there was a doctor and he turned people in who used drugs.

After a while WILLIAMS said that everyone went upstairs. She did not call the police because she did not know the number, so she went upstairs and tried to talk them into coming back downstairs. She said they told her to go away and while she was there she observed that they were pounding on [a] blanket. She said she went into the room and took the baby in her arms to prevent him from being further beaten[ ].

WILLIAMS said that they then forced her to hit the baby. About that time, another child came in and WILLIAMS said she grabbed him and hid him in the closet. She said that the dark headed, dark complected male described above killed the other boy in the bathroom.

WILLIAMS advised that during all of this commotion the mother woke up once but then went back to sleep. WILLIAMS said that she woke her up again and tried to get the woman to jump out the window with her. She said she also asked the woman for a gun because she said that the other people were going to kill them. She described the woman as being skinny and possibly being pregnant. A little while later, the dark skinned dark complected male ordered CATHY to tie the woman up and to kill her. She said that she stabbed the woman several times in the leg and several times in the abdomen. After murdering the woman she wrote in blood on the wall, "Fuck you pigs from all of us to you." She also advised that she wrote the year on the wall also in blood. WILLIAMS advised that they were in the house from approximately 11 p.m. until 4 or 5 a.m. She described the weather as being rather warm and clear there was no rain that evening.

WILLIAMS advised that after the two children and the mother were murdered they left the house

and the individuals in the white station wagon took her to her home and warned her not to contact the police.

This statement is yet another example of the bizarre behavior that the case has evoked from people who for some reason find it fascinating and see themselves as having played a part in the gruesome story. Apparent from the most superficial reading of Williams' statement is that the facts retold by her are completely at odds with the known facts and those MacDonald claims were confessed to by Stoeckley. For example, (1) there was no evidence that MacDonald had received an injection of any kind on that night; (2) the front door to the MacDonald apartment was not tampered with; (3) the weather that night was rainy and cold, not warm and clear; (4) the MacDonald apartment did not have an upstairs; (5) Colette MacDonald was not stabbed in the leg or abdomen; and (6) the MacDonalds had two daughters, not sons.

Williams exhibited unstable behavior in 1970 when she stabbed Jackie Don Wolverton, her pet puppy, and Betty Garcia's son and her problems appear to have gotten no better over the years for she has been diagnosed as a schizophrenic and is presently under her doctor's care. Given the factual inconsistencies in her statement and her mental condition, her attempted confession to these murders is completely unbelievable.

E. Statements of Stoeckley, Mitchell and Williams at a New Trial.

Evidence offered in support of a new trial motion must be of such a nature that it would be admissible at a second trial were one held. *See e.g., United States v. Mackin*, 561 F.2d 958, 961-62 (D.C. Cir.), *cert. denied*, 434 U.S. 959 (1977); *United States v. McBride*, 463 F.2d 44, 48-49 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972). The government takes the position that the hearsay

statements of Stoeckley, Williams and Mitchell would be inadmissible at a new trial because the declarants are not reliable and there is insufficient proof that the statements are trustworthy.[25] MacDonald replies that the statements would be admissible under Rule 804 (b)(3), F.R.Evid., because there are "corroborating circumstances [which] clearly indicate the trustworthiness of the statement[s]" and because a recent decision by the Fourth Circuit Court of Appeals, *United States v. Brainard*, 690 F.2d 1117 (4th Cir. 1982), prevents the court from considering the declarant's credibility when ruling upon statements offered under Rule 804(b)(3).

Writing for the Court of Appeals in *Brainard*, Judge Murnaghan noted that Rule 804(b)(3) "requires not a determination that the declarant is credible, but a finding that the circumstances clearly indicate that the statement was not fabricated. It is the statement rather than the declarant which must be trustworthy." 690 F.2d at 1124. As shown in a discussion of the statements by Stoeckley and Williams, the circumstances surrounding these statements strongly suggest that they were fabricated by the declarants, either intentionally or unintentionally. Mitchell's statements on the other hand were made under circumstances which would accord them a degree of trustworthiness but there is not enough evidence to show that he actually made them or that they were in reference to the MacDonald murders for them to be of evidentiary value to MacDonald at a second trial.

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25. There are dozens of affidavits in the record other than the statements of Stoeckley, Mitchell and Perry which also may run afoul of the rule against hearsay but the parties have not contested the admissibility of these statements and the court will assume that the witnesses making them would appear at a second trial if called to testify. Pursuant to the parties' stipulation during the evidentiary hearing, all evidence, including the statements of Stoeckley, Williams and Mitchell, was admitted into evidence without objection for purposes of ruling upon the motion for new trial. Evidentiary Hearing Tr., Vol. 2 at 101.

Even though the *Brainard* decision seemed to foreclose trial courts from considering the declarant's credibility when ruling on the admissibility of statements under Rule 804(b)(3), credibility as a consideration appears to have been revived to a limited extent by the Fourth Circuit's decision in *United States v. Carvalho*, 742 F.2d 146 (4th Cir. 1984), an opinion also authored by Judge Murnaghan. After referring to a number of facts which led him to question the motives of an affiant, Judge Murnaghan noted that "[e]ven in light of the *caveat* that it 'is the statement rather than the declarant which must be trustworthy,' *United States v. Brainard*, [690 F.2d] at 1124, we conclude that the . . . affidavits lack reliability and, therefore, fail to satisfy the trustworthiness requirement of . . . [Rule] 804(b)(3)." 742 F.2d at 150. If after *Carvalho* the declarant's credibility remains a valid consideration for the trial judge to weigh in ruling upon admissibility of statements against interest under Rule 804(b)(3), the admissibility of the statements by Stoeckley, Mitchell and Williams at a second trial would be even more doubtful.[26] Again, according MacDonald the benefit of any and every doubt, however, the court will assume that the statements would be admissible at a new trial and turn to the question of what legal standard is to be applied to this and the other evidence.

F. The Legal Standards Applicable to the Motion for New Trial

Arguing that MacDonald's motion is no different than any other motion for a new trial based upon newly discovered evidence, the government contends that the traditional standard for granting such motions should be

26. Stoeckley also appears to have been offered immunity on serveral occasions in return for her statements. If made, this promise would mitigate against a finding that the statements were against her interest when made since they did not "tend[] to expose [her] . . . to criminal liability. . . ." Rule 804(b)(3), F.R.Evid.

applied and that, under this standard, MacDonald "must show that the newly discovered evidence is 'of such a nature that a new trial would probably produce a new result.' " *United States v. Lott,* No. 84-5023, Slip Op. at 8 (4th Cir., January 10, 1985) (published) (*quoting United States v. Mesa,* 660 F.2d 1070, 1077 (5th Cir. 1981)). Conversely, MacDonald claims that because the case involves both the suppressed evidence discussed earlier and newly discovered evidence from a neutral source, the court should apply the two more lenient tests of *United States v. Agurs,* that is, the "any reasonable likelihood" or "might have affected the outcome of the trial" tests, to all of the evidence. 427 U.S. at 103-04. The government responds to this argument by saying even if the *Agurs* test do apply, the proper test is the third one: whether the evidence "creates a reasonable doubt which did not otherwise exist." *Id.* at 112.

The court having already determined that the government did not suppress evidence, there is no need to decide whether MacDonald is correct that the *Agurs* standards can be used in cases involving both suppression of evidence and newly discovered evidence from a neutral source. The court will note, however, that MacDonald's reading of *Agurs* would be inconsistent with that case because as Justice Stevens noted in the opinion

> [i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

Id. at 111; *see United States v. Imbruglia,* 617 F.2d 1, 4 (1st Cir. 1980); *United States v. Sutton,* 542 F.2d 1239, 1242 n.3 (4th Cir. 1976). Reading *Agurs* so broadly as to allow its application to motions for new trial based on newly discovered evidence from a neutral source would

blur the distinction alluded to by Justice Stevens. Although Justice Marshall in dissent points out that the third "create a reasonable doubt which did not otherwise exist" test of *Agurs* is essentially the same as the "probably produce a new result" test, he does not state or imply that suppression standards should be used in cases involving newly discovered evidence from a neutral source. *Agurs*, 427 U.S. at 114-16 (Marshall, J., joined by Brennan, J., dissenting). Furthermore, accepting MacDonald's broad reading of *Agurs* still would not entitle him to application of the "any reasonable likelihood" standard because there has been no showing that the prosecution knowingly used prejured testimony in the case. *Agurs*, 427 U.S. at 103.

With the possible exception of Stoeckley's statements, the court agrees with the government that the evidence submitted by MacDonald should be weighed against the traditional "would probably produce a new result" standard. Under this test, a new trial will follow if a criminal defendant successfully proves that (1) the evidence was discovered following trial; (2) the defendant exercised due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to issues before the court and (5) the evidence is of such a nature that a new trial would probably produce a new result. *United States v. Swarek*, 667 F.2d 41, 43 (8th Cir. 1982), *cert. denied*, ____U.S. ____, 103 S.Ct. 723 (1983); *United States v. Mesa*, 660 F.2d 1070, 1077 (5th Cir. 1981); *United States v. Pappas*, 602 F.2d 131, 133 (7th Cir.), *cert. denied*, 444 U.S. 949 (1979); *United States v. Eldred*, 588 F.2d 746, 753 (9th Cir. 1978).

Not argued by the parties but persuasive to the court is the argument that at least Stoeckley's statements should be evaluated under the legal standard applicable to new trial motions which are based upon the statements of a recanting witness. At trial, Stoeckley testified that she could not remember where she had been or

what she had done on the night of the murders. Although she has since alternated between lack of memory and almost total recall, on at least ten occasions she has recanted her trial testimony. In this circuit, a motion for a new trial based upon a witness' recantation will be granted only if (1) the court is reasonably well satisified that the testimony given by the witness was false; (2) without the testimony, the jury *might* have reached a different conslusion; and (3) the defendant was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial. *United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1976); *see United States v. Carmichael*, 726, F.2d 158, 159 (4th Cir. 1984); *United States v. Johnson* 487 F.2d 1278, 1279-80 (4th Cir. 1973).

G. The Merits of MacDonald's Motion for New Trial

The jury's guilty verdict following the almost seven weeks of trial in 1979 was fully supported by the evidence and MacDonald's challenge to the sufficiency of the evidence was rejected by this court and the Fourth Circuit Cout of Appeals. *United States v. MacDonald*, 485 F.Supp. at 1097; *aff'd*, 688 F.2d at 234, *cert. denied*, ____ U.S.____, 103 S. Ct. 726 (1983). The government presented a thorough case against MacDonald, using substantial physical and circumstantial evidence and expert testimony in its case-in-chief. MacDonald answered the prosecution's allegations with his own story that the murders had been committed by four intruders who entered his home through an unlocked back door in the early morning hours of February 17, 1970, but the jury obviously declined to accept this story and chose instead to believe the government's version of what transpired that night.

Were a second trial held, the government would again be able to introduce such damaging evidence

against MacDonald as his pajama top, the location of fibers from the pajama top in parts of the house which would be inconsistent with MacDonald's story, the bloody footprint leaving Kimberly MacDonald's bedroom, the pajama top demonstration whereby it was shown that the holes in the top matched icepick wounds on the body of Colette MacDonald, and the other evidence which proved, apparently conclusively so, that MacDonald murdered his family. The government's case has not been materially enhanced since the first trial, founded as it is upon evidence derived from a static crime scene, but the court is unable to conclude that the evidence would not again be persuasive to a new jury.

Reduced to its essence, MacDonald's evidence at a second trial would consist of his own account of the murders, character witnesses on his behalf, impeachment of the integrity of the crime scene, and the statements, if successfully admitted into evidence, of Stoeckley, Mitchell and Williams and evidence supporting these statements. The question thus becomes whether this evidence when weighed against the government's evidence is sufficient to warrant granting of the motion of a new trial.

The statements by Helena Stoeckley, as a recanting witness, are not enough to justify a new trial of the case because they fail to satisfy two of the three prerequisites under *United States v. Wallace*, 428 F.2d at 866, and the failure to meet any of these requirements is fatal to the motion. *United States v. Carmichael*, 726 F.2d at 159. Far from being "reasonably well satisfied that the testimony given by [Helena Stoeckley at trial was] false," *Wallace*, 528 F.2d at 866, the court is certain that Stoeckley was telling the truth at trial when she testified that she could not recall the whereabouts on the night of the murders. This was what she said for over ten years following the crimes and MacDonald has failed to convince the court that her "confessions" show otherwise.

These statements are factually erroneous and inconsistent not only with MacDonald's story but with the physical evidence gathered from the crime scene and whether they were created from the memory of a confused young woman's mind or intentionally fabricated, perhaps with Beasley's assistance, a review of the record leaves the court without any doubt that the statements are false and that Stoeckley's trial testimony was accurate.

Even were the court to assume Stoeckley lied on the witness stand, it could not conclude "[t]hat without [Stoeckley's testimony] the jury *might* have reached a different conclusion." *Wallace*, 528 F.2d at 866. It may well be that Stoeckley's trial testimony took the defense by surprise, but if the jury had not heard that testimony but instead had heard her so-called confessions, in the court's opinion the jury would not have reached a different verdict, for the government's cross-examination would surely have developed the glaring inconsistencies in her story as previously noted and that because of her drug-crazed condition she was a totally unreliable, untrustworthy witness.[27]

Mindful of the Fourth Circuit's observation that "[w]here a motion for a new trial is based upon recantation of testimony given at . . . trial, such recantation is 'looked upon with the utmost suspicion,' " the court finds that the facts do not support MacDonald's arguments and concludes that with or without Stoeckley's trial testimony or her "confessions," the jury would still have rendered a guilty verdict. *Johnson*, 487 F.2d at 1279 (*quoting United States v. Lewis*, 338 F.2d 137, 139 (6th Cir. 1964)); *United States v. Troche*, 213 F.2d 401, 403 (2d Cir. 1954).

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27. Just how much of the newly discovered evidence defendant might offer at a new trial would pose serious tactical problems for trial counsel. It seems obvious to the court that the use of at least some of it (*e.g.*, the Cathy Williams statement) would cast serious doubt on the credibility of the remainder.

A similar conclusion follows when all of the newly discovered evidence, including Stoeckley's post-trial statements, is measured against the traditional new trial standard requiring "that the newly discovered evidence [be] 'of such a nature that a new trial would probably produce a new result.' "[28] *United States v. Lott*, Slip Op. at 8. This is of course a more stringent test than the one used for recanting witnesses and MacDonald's evidence falls even further below this standard. The court will assume as true defense counsel's claim that all of the new evidence was discovered after trial and counsel used due diligence to discover the evidence, but when the new evidence is balanced against the evidence presented by the prosecution following its more than eight-year investigation of the MacDonald case which established a motive for the murders and a theory concerning their commission, and against the absence of any direct, physical evidence proving McDonald's story, the newly discovered evidence with its multiple inaccuracies and inconsistencies would not produce a different result were it introduced at a second trial, nor is there any reasonable likelihood that a jury would acquit MacDonald based upon the newly discovered evidence. The motion of new trial must therefore be denied.

Conclusion

Almost nine years passed between the MacDonald murders and the time the case came on for trial before this court and a jury in July of 1979. The parties on both sides of the case fully availed themselves of the opportunity before trial to investigate the crime scene and to

28. Although the court has found that the government did not use Dr. Brussel as an investigative agent in examining MacDonald and there has been no suppression of evidence, the documents supporting these motions which MacDonald says he did not have access to until after trial have also been considered by the court as newly discovered evidence for purposes of ruling on the motion for new trial.

develop the evidence which was introduced at a trial lasting almost seven full weeks and resulting in MacDonald's being found guilty of the murder of his wife and two young daughters.

Over five years have now passed since the trial, more investigation has been undertaken and more evidence entered into the record, but the result is the same. The court has been unable to find that the prosecution used a psychiatrist as an investigative agent to obtain incriminating statements from MacDonald during trial, nor has it been able to conclude that the government suppressed any evidence favorable to MacDonald, either before, during or after trial.

The case has attracted an astonishing amount of publicity. Helena Stoeckley, Cathy Perry Williams and, to a more limited extent, Greg Mitchell, were drawn to the case and have contributed to a factual charade which has allowed it to continue for more than a decade and a half. Their "confessions" have been shown to be unbelievable and, even with the affidavits offered to corroborate the statements, if the government were again called upon to present its evidence at a new trial and MacDonald was able to put all, or even selected parts of his new evidence before a second jury, the jury would again reach the almost inescapable conclusion that he was responsible for these horrible crimes.

The three motions presently before the court must therefore be denied. An order accordingly will be entered.

F. T. DUPREE, J.
United States District Judge

March 1, 1985.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 75-26-CR-3

UNITED STATES OF AMERICA,
Plaintiff

v

JEFFREY R. MACDONALD,
Defendant

ORDER

For the reasons stated in the court's memorandum of decision this day filed, it is now

ORDERED that the motions of defendant to vacate his sentence, to set aside the judgment of conviction and for a new trial be and the same are hereby denied.

F. T. DUPREE, J.
United States District Judge

March 1, 1985.

(3)

No. 85-1571

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court judge should have recused himself under 28 U.S.C. 455 from presiding over petitioner's trial and post-conviction proceedings.

2. Whether a government psychiatrist deliberately elicited information from petitioner in violation of his Sixth Amendment right to counsel.

3. Whether the government deliberately withheld exculpatory evidence from the defense.

4. Whether the district court properly denied petitioner's motion for a new trial on the basis of newly discovered evidence.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 779 F.2d 962. The opinions of the district court (Pet. Supp. App. SA1-SA15, SA16-SA107[1]) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1985. A petition for rehearing was denied on January 27, 1986 (Pet. App. A10). The petition for a writ of certiorari was filed on March 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The Supplemental Appendix omits seven pages of the district court's opinion denying petitioner's motions for post-trial relief. Where necessary, therefore, we will cite to that portion of the opinion as it is reprinted in the joint appendix filed in the court of appeals in this proceeding.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. After his conviction became final,[2] petitioner filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 on the basis of newly discovered evidence, as well as two motions for postconviction relief under 28 U.S.C. 2255 and a motion to recuse the district court judge under 28 U.S.C. 144 and 455. The district court denied the motions (Pet. Supp. App. SA1-SA15, SA16-SA107, SA108), and the court of appeals affirmed (Pet. App. A1-A9).

1. In the early morning of February 17, 1970, while petitioner was serving as an Army Medical Corps captain and assigned to Fort Bragg, North Carolina, petitioner's wife and two daughters were bludgeoned and stabbed to death in his military quarters. Petitioner summoned the Military Police and, during a series of interviews, he gave the investigators his account of what had occurred on the night of the murders. He told the investigators that a band

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[2]The road to final judgment in this case was a tortuous one. Before trial, petitioner moved to dismiss the indictment on the ground that his rights under the Sixth Amendment Speedy Trial Clause had been violated. The district court denied his motion, but the court of appeals reversed and ordered the indictment dismissed. 531 F.2d 196 (1976). This Court vacated the court of appeals' judgment on the ground that petitioner could not take an interlocutory appeal from the district court's denial of his motion to dismiss the indictment on speedy trial grounds. 435 U.S. 850 (1978). Following petitioner's trial, the court of appeals reversed petitioner's convictions on the ground that his right to a speedy trial had been violated. 632 F.2d 258 (1980). This Court reversed and remanded the case to the court of appeals for disposition of the remaining issues. 456 U.S. 1 (1982). On remand, the court of appeals affirmed, 688 F.2d 224 (1982), and this Court denied certiorari. 459 U.S. 1103 (1983).

of four "hippies" had broken into his house, stabbed him, and assaulted the other members of his family. He described the intruders as including a black male wearing an army field jacket, and two white males. He said that they were accompanied by a blond-haired female who wore muddy boots, a floppy hat, carried a candle, and chanted "acid is groovy; kill the pigs." 456 U.S. 1, 3-4 (1982). Based on physical evidence from the murder scene, the government at trial sought to show that petitioner's version of the events was false and that he had murdered all three members of his family by himself (456 U.S. at 4 n.2; Pet. Supp. App. SA17-SA18, SA55-SA66).[3]

a. Before trial, Helena Stoeckley, a drug addict and a member of the local "hippie" community, made a series of statements that appeared to link her to the crimes and to corroborate petitioner's story. On each occasion, however, she either contradicted her admission or qualified it, by stating that she could not recall her whereabouts at the time of the murders or by stating that her account of the events on the night of the murders was the product of drug-induced hallucinations. Pet. Supp. App. SA19, SA67-SA71; 688 F.2d 224, 230-231 (1982).[4] At petitioner's trial, Stoeckley was called as a defense witness. She repeated her earlier statements that she had no recollection concerning her whereabouts at the time of the murders, she denied any involvement in the offenses, and she admitted that her knowledge of the crimes was based on what she had heard on radio news bulletins and what others had told her (456 U.S. at 4 n.1; Pet. Supp. App. SA20, SA71-SA74). The

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[3]The evidence against petitioner is set forth in some detail in the Brief for the United States (at 3-7) filed with this Court in No. 80-1582.

[4]"Tr." refers to the trial transcript. "C.A. App." refers to the joint appendix filed in the court of appeals in this proceeding. "H. Tr." refers to the transcript of the hearing on petitioner's motions for postconviction relief.

district court refused to admit Stoeckley's earlier statements concerning her possible involvement in the murders under Fed. R. Evid. 804(b)(3) as statements against her penal interest. The court held that that Stoeckley's earlier statements lacked the clear indicia of trustworthiness required by the Rule. Tr. 5806-5807; see also 485 F. Supp. 1087, 1091-1093 (E.D.N.C. 1979).[5]

Following his conviction, petitioner retained private investigators to conduct a further investigation of his case and, specifically, to examine the possible involvement of Stoeckley and several of her male companions in the murders (Pet. Supp. App. SA20). During the course of their investigation, one of the investigators obtained additional statements from Stoeckley, which indicated that she may have participated in the murder of the MacDonald family. She subsequently recanted some of these statements, explaining that they were based upon dreams rather than a positive recollection of what had occurred on the night of the murders. See, *e.g.*, Pet. Supp. App. SA74-SA84; C.A. App. 914-916. Petitioner's investigators also obtained statements from others to the effect that they had observed persons matching petitioner's descriptions of the intruders in the vicinity of Fort Bragg shortly before or after the murders, or that persons resembling Stoeckley's known male companions had made statements suggesting their involvement in the crimes (*e.g.*, Pet. Supp. App. SA87-SA96; C.A. App. 190, 212-213, 479, 481-484). Finally, the investigators obtained, through Freedom of Information Act (FOIA) requests, various documents from the government's case files.

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[5]The court of appeals upheld the district court's ruling on the ground that, because Stoeckley was "an inherently unreliable witness," the district court's ruling was well within its discretion (688 F.2d at 233; see Pet. App. A3-A4).

b. On the basis of this material, petitioner filed a motion in April 1984, seeking a new trial on the basis of newly discovered evidence, pursuant to Fed. R. Crim. P. 33. In addition, he filed two motions for postconviction relief under 28 U.S.C. 2255. One motion alleged that the government had deliberately withheld exculpatory information that petitioner had discovered pursuant to his FOIA requests.[6] Petitioner's second motion claimed that a government psychiatrist who, pursuant to a court order, had examined petitioner during trial was actually a government investigator and had obtained statements from petitioner in violation of his Fifth Amendment privilege against compulsory self-incrimination and his Sixth Amendment right to counsel. Petitioner also filed a motion, pursuant to 28 U.S.C. 144 and 455, seeking the recusal of the trial judge, the Honorable Franklin Dupree, from further participation in the case. The motion was based upon the claim that Judge Dupree's former son-in-law, Jimmie C. Proctor, had participated in the prosecution of the case while he was an Assistant United States Attorney for the Eastern District of North Carolina.

3. Before ruling on petitioner's motions for a new trial, Judge Dupree denied petitioner's recusal motion (Pet. Supp. App. SA1-SA15). Judge Dupree stated he was unaware of Proctor's involvement in this case at the time he became a judge, and that he and Proctor had never discussed the case (*id.* at SA3). Judge Dupree also found that, despite Proctor's belief that petitioner was responsible for the murders and Proctor's unsuccessful attempts to have

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[6]That information included the allegation that a bloody syringe was allegedly found at the MacDonald residence by investigators; that a skin fragment was discovered under Mrs. MacDonald's fingernail during an autopsy, but was subsequently lost; and that investigators had been given a pair of muddy boots that were allegedly similar to petitioner's description of those worn by the female intruder.

the matter investigated by the United States Attorney's Office, Proctor's only role in the case was representing an FBI agent during the initial Article 32 investigation and assisting FBI and Army Criminal Investigation Division (CID) investigators during their reinvestigation (*id.* at SA9). Given Proctor's limited involvement in the matter, as well as the fact that Proctor was no longer a member of the U.S. Attorney's Office and had been divorced from Judge Dupree's daughter for nearly seven years by the time of petitioner's trial, Judge Dupree concluded that no reasonable person would have doubted his impartiality (*ibid.*). Accordingly, Judge Dupree rejected petitioner's claim that he should have recused himself under 28 U.S.C. 144 or 455 from presiding over petitioner's trial.[7]

Judge Dupree also denied petitioner's other motions in an exhaustive opinion (Pet. Supp. App. SA16-SA107). The court rejected petitioner's claim that a psychiatrist retained by the government to examine him was, in fact, an investigative agent and that his questioning violated petitioner's Fifth and Sixth Amendment rights (*id.* at SA22-SA39). The court found no evidence to support that allegation, and it found no evidence that the prosecutors had furnished the psychiatrist with questions to ask petitioner or had used any information from the examination during the trial (*id.* at SA33, SA39). The court also rejected petitioner's claim that the government had suppressed exculpatory evidence (*id.* at SA40-SA54). The court found that the government had not deliberately suppressed any evidence, and that, in any

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[7]In the district court, petitioner also argued that Judge Dupree should have recused himself under 28 U.S.C. 455(b)(5)(ii), which requires a judge to disqualify himself when a close relative acts as a lawyer in the proceeding, and under Subsection (b)(5)(iii), which requires a judge to recuse himself if he is aware that a close relative has an interest that could be substantially affected by the outcome of the proceeding. See C.A. App. 56-62. Judge Dupree rejected both claims (Pet. Supp. App. SA12-SA13). Petitioner did not pursue these claims in the court of appeals, and we will not discuss them here.

event, there was an insufficient showing that the items at issue were exculpatory (*id.* at SA42, SA54). Finally, the court rejected petitioner's claim that he was entitled to a new trial on the basis of newly-discovered evidence, such as Stoeckley's post-trial statements and other evidence allegedly tending to corroborate her involvement and that of her male acquaintances in the murders (*id.* at SA54-SA106). The court credited Stoeckley's testimony at trial that she could not recall her whereabouts on the night of the murders (*id.* at SA104-SA105). In addition, the court found that neither Stoeckley's statements, nor those of other persons, would lead to a different result at a new trial (*id.* at SA104-SA106).

4. The court of appeals affirmed (Pet. App. A1-A9). The court rejected petitioner's claim that Judge Dupree should have disqualified himself because of his former relationship with Jimmy Proctor, on the ground that Proctor's divorce from Judge Dupree's daughter and his resignation from the United States Attorney's Office long before the trial of this case eliminated any taint that might otherwise have required Judge Dupree to recuse himself (*id.* at A2). The court of appeals also rejected petitioner's claim that he was entitled to a new trial on the basis of newly-discovered evidence. The court upheld the district court's conclusion that the evidence would not have produced a different result at a new trial, particularly in view of the strong circumstantial evidence showing that petitioner's account of the murders was false (*id.* at A4-A5). The court of appeals also rejected petitioner's claim that the government had deliberately suppressed exculpatory evidence at his trial. The court upheld the district court's rulings that the government had not deliberately suppressed any evidence and had acted "in complete good faith" (*id.* at A8). The court also agreed with the district court that the evidence at issue was not exculpatory (*ibid.*). Finally, the court rejected as "speculation"

petitioner's argument that the psychiatrist who examined him prior to trial was, in fact, a government investigator (*id.* at A9).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal issue. Both lower courts correctly rejected petitioner's fact-bound claims in comprehensive opinions on which we rely. Accordingly, review by this Court is not warranted.

1. Petitioner argues (Pet. 10-17) that Judge Dupree should have recused himself from presiding over both the trial and post-trial proceedings in this case because of his former son-in-law's involvement in the case. That claim lacks merit.

a. The facts relevant to this claim are the following: The Army formally charged petitioner with the murder of his family on May 1, 1970. Thereafter, the Army began a formal, pre-court-martial investigation, conducted by an investigating officer under Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 832. Proctor attended the hearings to represent the interests of the Department of Justice and the FBI. At the time of those proceedings, Proctor was married to Judge Dupree's daughter. At the close of the Article 32 proceedings, the investigating officer recommended that the charges against petitioner be dismissed, and the charges were ultimately dropped on October 23, 1970. Pet. Supp. App. SA2.

In December 1970, following petitioner's discharge from the Army, the Army Criminal Investigation Division (CID) examined allegations by petitioner's counsel that the Army had mishandled its earlier investigations and that Stoeckley

may have been involved in the murders. During the reinvestigation, Proctor acted as a liaison between the Department of Justice and the CID; in particular, he arranged for office space and he coordinated the discussions between CID investigators and FBI agents. C.A. App. 486, 491-492; see Pet. Supp. App. SA5-SA6. Although Proctor personally believed that MacDonald should be a suspect in the murders, and he unsuccessfully urged the incumbent United States Attorney to initiate an FBI investigation into the crime, Proctor had no control over the investigation (C.A. App. 485-486; see Pet. Supp. App. SA9 ("any statements [Proctor] may have made expressing this personal conviction appear to have fallen on deaf ears")).

Judge Dupree was appointed to the bench in December 1970 and was sworn in the following month (Pet. Supp. App. SA3). As a result, Proctor resigned his position as an Assistant United States Attorney on February 28, 1971, and thereafter had no connection with this case (*ibid.*). Between the time of Judge Dupree's appointment and Proctor's resignation, no investigation of the MacDonald family murders was conducted by a grand jury, the United States Attorney's office, the Department of Justice, or the FBI. Proctor and Judge Dupree's daughter were divorced on July 27, 1972, following a one-year separation. *Id.* at SA2 n.1; C.A. App. 484-488.

In June 1972, after having examined a report of the CID investigation, the United States Attorney informed the Justice Department that he was declining prosecution of petitioner. In August 1974, however, at the suggestion of the CID, an attorney of the Justice Department's Criminal Division, aided by an Assistant United States Attorney for the Eastern District of North Carolina, began a grand jury investigation to develop additional facts regarding the murders. The grand jury returned an indictment in January 1975 charging petitioner with the murder of his wife and

daughters. Judge Dupree was assigned the case for trial, which ultimately began in July 1979. Pet. Supp. App. SA3.

b. Petitioner claims that Judge Dupree should have recused himself from presiding over the trial.[8] However, petitioner did not raise that claim in the district court; there, he only sought to have Judge Dupree recused from any "further" participation in the case (see Pet. Supp. App. SA1). Moreover, petitioner did not raise his present claim in the court of appeals (see Appellant's Br. 15-19). Accordingly, he may not now press his claim that Judge Dupree should have recused himself from presiding over the trial. See, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, a conviction may not be set aside on this ground when the defendant does not raise the claim

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[8]Petitioner also maintains (Pet. 10, 14, 15) that it was improper for Judge Dupree to decide the recusal motion. Petitioner did not raise that issue in the district court or the court of appeals (see Appellant's Br. 15-19), and therefore he may not raise it now. See, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, that claim lacks merit. "Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge. It requires the judge to *disqualify himself* when any one of the statutory conditions is met." *United States* v. *Balistrieri*, 779 F.2d 1191, 1202-1203 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986) (emphasis in original). See also, *e.g., In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *United States* v. *Cross*, 708 F.2d 631, 639 (11th Cir. 1983). This is because "[t]he challenged judge is most familar with the alleged bias or conflict of interest" and "[r]eferring the motion to another judge raises problems of administrative inconvenience and delay." *Chitimacha Tribe* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

Even in the case of recusal motions under Section 144, the courts recognize that, as in this case, a district judge may rule on the threshhold question whether the allegations in the recusal affidavit are legally sufficient. See, *e.g., Berger* v. *United States*, 255 U.S. 22, 36 (1921); *United States* v. *Balistrieri*, 779 F.2d at 1199-1202.

until after trial. *United States* v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, No. 85-924 (Feb. 24, 1986); see *Marty's Floor Covering Co.* v. *GAF Corp.*, 604 F.2d 266, 268 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980) (disqualification under 28 U.S.C. 144 is prospective only).[9]

The courts below also correctly rejected petitioner's claim that Judge Dupree should have recused himself under 28 U.S.C. 455(a).[10] Section 455(a) requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The standard for determining whether there is an appearance of partiality under this subsection is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); see also, *e.g.*, *United States* v. *Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986); *United*

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[9]Petitioner incorrectly asserts (Pet. 8, 13) that he was unaware of Proctor's relationship with Judge Dupree or Proctor's involvement in this case until he received the FOIA materials during the post-trial investigation. An affidavit executed by Proctor in connection with petitioner's recusal motion states that, prior to the murder of the MacDonald family, both he and his former wife were socially acquainted with Wade Smith, petitioner's local counsel, and that, while representing the Department of Justice at the Army's 1970 CID investigation, he had a confrontation with Bernard Segal, another attorney who represented petitioner. C.A. App. 485. Although petitioner may not have been aware of all of Proctor's activities in connection with the investigation of the murders, the information available to him was more than enough to put a reasonable person on notice of the basic facts of Proctor's role in the investigation (*Murphy*, 768 F.2d at 1540).

[10]Petitioner also relied on 28 U.S.C. 144, 455(b)(5)(ii) and (iii) in the district court (see Pet. Supp. App. SA4 n.4, SA10-SA14), but he did not pursue those claims in the court of appeals (see Appellant's Br. 15-19).

States v. *Murphy*, 768 F.2d at 1538; *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980) (question is how the judge's "participation in a given case looks to the average person on the street"). In this case, no "disinterested observer" (*Pepsico, Inc.*, 764 F.2d at 460) aware of the pertinent facts would harbor a "significant doubt" (*ibid.*) as to Judge Dupree's impartiality in this case.[11]

Although Proctor personally believed that petitioner had murdered his family, and although he unsuccessfully sought to have petitioner prosecuted, Proctor never played any role in prosecution of petitioner's case. His only official function in the matter was to represent the Department of Justice during the Army's 1970 Article 32 investigation and to act as a liaison between the CID and the FBI in the course of the CID's 1970-1971 reinvestigation. Proctor's involvement during this case therefore occurred well before Judge Dupree was appointed to the bench. Pet. Supp. App. SA9. During that period, neither the Department of Justice nor the United States Attorney's Office was conducting an investigation. In fact, the incumbent United States Attorney expressly declined to permit his office to become involved in the investigation or to seek an indictment

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[11]To the extent that petitioner contends that Judge Dupree's bias is revealed by his evidentiary rulings, the short answer to that claim is that the court of appeals has upheld every one of Judge Dupree's challenged evidentiary decisions. The admissibility of Stoeckley's statement was litigated during a prior appeal, and the court of appeals upheld Judge Dupree's ruling on that issue. 688 F.2d at 230-234. Judge Dupree's rulings on petitioner's discovery motions were also litigated during the prior appeals in this case (see, *e.g.*, 79-5253 Defendant's Br. at 240-248), and were upheld by the court of appeals (531 F.2d at 209). Petitioner has also offered no factual support for his speculation (Pet. 13) that he would have learned of Proctor's involvement in the investigation if his discovery motions had been granted. Indeed, he has not even attempted to demonstrate that his discovery requests touched on that subject.

against petitioner (see C.A. App. 492-494, 506). When an indictment was returned in January 1975 and Judge Dupree was first called on to make any discretionary rulings in the case, Proctor had been out of the United States Attorney's office for four years and had been divorced from Judge Dupree's daughter for more than three years. And when the trial commenced in July 1979, Proctor had been away from the office for more than eight years and had been divorced from Judge Dupree's daughter for almost seven. Under these circumstances, the court of appeals correctly found that there was "no vestige of the taint requiring the trial judge to disqualify himself at the time of the trial in 1979 or at the time the post conviction motions came on for hearing in 1984" (Pet. App. A2-A3). See *S.J. Groves & Sons Co.* v. *International Brotherhood of Teamsters*, 581 F.2d 1241, 1246-1249 (7th Cir. 1978).

2. Petitioner also claims (Pet. 17-20) that a psychiatrist retained by the government to examine him prior to trial for the limited purpose of determining his mental state disclosed the results of that examination to the prosecutors, who thereafter used that information to cross-examine petitioner. Relying on *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), petitioner argues that the psychiatrist's examination violated his right to counsel.[12] That claim lacks merit.

At trial, petitioner moved for leave to introduce psychiatric testimony that he was mentally incapable of committing the murderous attack on his family. At the government's request, the district court ordered petitioner to submit to a psychiatric evaluation by psychiatrists of the government's choosing. The government selected Dr. Hirsch Silverman, a

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[12]In the courts below, petitioner also argued that the psychiatrist's examination violated his Fifth Amendment privilege against compulsory self-incrimination, but he has not presented that claim in this Court as a separate question. See Pet. i.

psychologist, and Dr. James Brussel, a forensic psychiatrist, who had previously been involved in the case on a limited basis. Drs. Silverman and Brussel examined petitioner outside the presence of his counsel. The district court thereafter denied petitioner's motion in order to avoid "a battle of experts" (485 F. Supp. at 1096; see 688 F.2d at 227-228; Pet. Supp. App. SA28). Accordingly, neither Dr. Brussel nor Dr. Silberman testified at trial.

There is no merit to petitioner's claim that the government used the results of Dr. Brussel's examination to cross-examine him at trial[13] or that Dr. Brussel served as an "investigating criminologist" in the government's camp (Pet. 18). Dr. Brussel was never debriefed by the prosecution, and his findings and conclusions were never reduced to writing (C.A. App. 1520-1522). In addition, as the district court found (Pet. Supp. App. SA36-SA39), the prosecutors had an independent source for the questions they asked petitioner on cross-examination. Moreover, Dr. Brussel's prior involvement in the case was minimal. The government investigators had consulted with Dr. Brussel more than eight years prior to the trial to obtain his advice concerning the psychological characteristics, possible motives, and identities of the murderers of the MacDonald family, as well as the direction that their further investigation should

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[13]Dr. Brussel's examination of petitioner by itself did not violate petitioner's right to counsel. Once a defendant intends to present psychiatric testimony in his defense at trial, he may be compelled to undergo an examination by a government psychiatrist in the absence of counsel. See, *e.g.*, *Taylor* v. *Best*, 746 F.2d 220, 223 (4th Cir. 1984), cert. denied, No. 85-5185 (Nov. 12, 1985); *United States* v. *Byers*, 740 F.2d 1104 (D.C.Cir. 1984) (en banc); *Vardas* v. *Estelle*, 715 F.2d 206, 208-212 (5th Cir. 1983); see also *Estelle* v. *Smith*, 451 U.S. 454, 465-466 (1981) (collecting cases). Acordingly, there would have been no violation of petitioner's right to counsel unless the government used the results of Dr. Brussel's examination at trial.

take (C.A. App. 470, 1584-1585).[14] Under these circumstances, the district court found that "there is no evidence that the prosecution enlisted Dr. Brussel as an investigative agent, gave him questions to ask MacDonald, debriefed him following the examination, or used any information from the examination against MacDonald during trial" (Pet. Supp. App. SA33). The court of appeals upheld that finding (Pet. App. A8-A9). Given these concurrent findings by the lower courts, further review of petitioner's fact-bound claim is not warranted. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).[15] Accordingly, there is no factual basis to petitioner's claim that Dr. Brussel's examination violated his Sixth Amendment rights.[16]

3. Petitioner also claims (Pet. 21-26) that the government failed to disclose several items of exculpatory evidence to the defense prior to trial. Both courts below, however,

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[14]Dr. Brussel became involved in the case in February 1971 when the CID investigators sought his opinion concerning the possible identities of the killers. Based on information given him by the CID investigators, Dr. Brussel stated that petitioner's account of the crime appeared to be false, but he added that petitioner's falsehood did not mean that petitioner had committed the murders. Pet. Supp. App. SA23, SA34.

[15]Petitioner asserts (Pet. 18) that he was unaware of Dr. Brussel's prior involvement in the case until he received documents from the government under the FOIA in 1983. The district court found, however, that the defense was on notice of Dr. Brussel's earlier involvement by April 1971, when a CID agent furnished Dr. Brussel's name to petitioner's defense counsel as one of the government's experts who would review petitioner's psychological tests. Pet. Supp. App. SA33.

[16]Petitioner also contends (Pet. 19) that the district court relied upon a report prepared by Dr. Brussel in denying his motion to present psychiatric evidence. However, Dr. Brussel never prepared a report following his examination of petitioner (C.A. App. 1520); the only psychological report that the government furnished to the district court was prepared by Dr. Silverman. The government submitted that report in connection with its opposition to petitioner's post-trial motion for bail. See C.A. App. 20.

found that the government did not deliberately suppress the items at issue and that, in any event, none of the items was exculpatory (Pet. App. A6-A8; Pet. Supp. App. SA42-SA54). See *United States* v. *Bagley*, No. 84-48 (July 2, 1985). Those concurrent findings do not warrant further review. We will, however, briefly summarize the facts that are pertinent to each of petitioner's claims.

a. Petitioner claims that the government withheld the fact that an Army investigator discovered a bloody syringe in the MacDonald home shortly after the murders. The only indication that such an item was ever found, however, was contained in the hearsay report of an investigator who had summarized the observations reported to him by persons who had inventoried a closet in the MacDonald home (Pet. App. A6; Pet. Supp. App. SA44; C.A. App. 1219); the investigators who actually inventoried the closet stated that no such syringe was discovered (Pet. App. A6; Pet. Supp. App. SA45). The district court thus properly concluded that the investigator's second-hand report was insufficient to establish that the syringe ever existed (Pet. Supp. App. SA45). Petitioner has also failed to show that the syringe would have constituted exculpatory evidence, even if it had been shown to have existed (*id.* at SA45-SA46).

b. In January 1971, Betty Garcia, the landlady of Cathy Perry, a young woman residing in Fayetteville, N.C., gave her attorney some property, including a pair of beige boots, that had belonged to Perry. The property was then turned over to the CID in the presence of Captain James Douthat, an attorney who had represented petitioner during the Army's Article 32 investigation (Pet. Supp. App. SA47-SA49).[17] The boots were examined for bloodstains or debris

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[17]Contrary to petitioner's assertion (Pet. 21), the district court found (C.A. App. 1938 (this portion of the district court's opinion is not reprinted in the Supplemental Appendix to the Petition)) that there was

that might connect them with the murders. When nothing was found, the items were returned to Ms. Garcia (Pet. App. A6). As the courts below found (Pet. App. A7; C.A. App. 1937, 1938-1941),[18] the boots turned over to the CID did not fit the description of the boots worn by the female intruder in petitioner's story. Because there was no evidence linking the boots to the murders, the government acted properly in returning them to Ms. Garcia because they were plainly of no exculpatory value.[19]

c. During the autopsy, a small fragment of what appeared to be human skin was discovered under Mrs. McDonald's fingernail (C.A. App. 1377, 1423, 1941).[20] Sometime between February 28 and December 19, 1970, the skin fragment was apparently lost (*id.* at 1942). Thereafter, the CID unsuccessfully attempted to locate the missing skin particle by examining the vials containing the fingernail scrapings. An autopsy report and the pathologist's testimony during the Article 32 investigation showed that the skin particle had been discovered during the procedure, and a laboratory report stated that the vials did not contain any skin particles. All the reports were furnished to the defense during the

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no bloody clothing included in the property turned over to the CID. That finding is supported by the property receipt that was signed by Captain Douthat (C.A. App. 1301).

[18]This portion of the district court's opinion is not reprinted in the Supplemental Appendix to the Petition.

[19]In addition, Captain Douthat, who was present when the boots were given to the CID, subsequently assisted the defense during pretrial preparations (C.A. App. 1692). Petitioner therefore had ready access to information concerning the boots, and his claim must fail for that reason as well. See *United States* v. *Dean*, 722 F.2d 92, 95 (5th Cir. 1983) (no *Brady* violation when accused has access to information and could obtain it himself by exercising due diligence).

[20]This portion of the district court's opinion is not reprinted in the Supplemental Appendix to the Petition.

pretrial discovery process. Pet. Supp. App. SA50; C.A. App. 1942-44.

As the Court explained in *Trombetta* v. *California*, 467 U.S. 479, 488-489 (1984) (footnote omitted), "[w]hatever duty the Constitution imposes on the [government] to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, * * * evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." As both courts below concluded (Pet. App. A7; Pet. Supp. App. SA49-SA50), there is no evidence that the skin particle, even if available at the time of the trial, would have exonerated petitioner. In fact, since petitioner had scratch marks which looked as though " 'somebody had dug their fingernails into his chest' " (Pet. Supp. App. SA50 (quoting Tr. 1413)), the skin particle "may very well have belonged to [petitioner]" (Pet. Supp. App. SA49; Pet. App. A7). Although the loss of the skin particle is regrettable, this case is akin to *Trombetta*, in which the government "did not [lose the particle] in a calculated effort to circumvent the disclosure requirements established by *Brady* v. *Maryland* and its progeny." 467 U.S. at 488.[21]

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[21]We also note that petitioner was furnished copies of both the autopsy report, revealing the initial discovery of the skin particle, and the laboratory report, disclosing that the examination of vials containing the debris scraped from beneath Mrs. MacDonald's fingernails during the autopsy failed to reveal the presence of skin particles. Accordingly, the defense was on notice of both the discovery and the loss (Pet. Supp. App. SA50). Petitioner's assertion to the contrary notwithstanding (Pet. 23), he was in a position to exploit these developments by challenging the manner in which the government investigated the case and processed the evidence, had he wished to do so.

d. In April 1971, a CID investigator, seeking to obtain Stoeckley's fingerprints, took a series of photographs of the wall of a room of her apartment in Nashville, Tennessee. Some of the photographs revealed the presence of an upper case "G" as part of various words that had been painted on the wall, apparently with Stoeckley's finger. In a handwritten note, the investigator observed that the letter seemed to resemble the "G" in the word "PIG" that had been written in blood on the headboard of a bed in the master bedroom in the MacDonald residence, ostensibly by one of the intruders. Pet. App. A7; Pet. Supp. App. SA51. Although the photographs of the wall were furnished to the defense prior to trial, the investigator's observation concerning the possible resemblance of the "G" to the one discovered on the headboard was not included in his typed report, a copy of which accompanied the photographs (Pet. App. A8; Pet. Supp. App. SA51-SA52).

As both courts below found (Pet. App. A8; Pet. Supp. App. SA52), the fact that the government failed to provide the defense with the investigator's speculations concerning the possible significance of the letter "G" is inconsequential, because petitioner has failed to demonstrate that this evidence was exculpatory. In fact, an FBI crime laboratory report that was produced when petitioner raised the issue during the post-trial proceedings states that neither the "G" on the wall of the apartment nor the "G" on the headboard contained the " 'inherent characteristics essential to . . . meaningful comparison' " (Pet. Supp. App. SA53 (citation omitted)). Moreover, the investigator who took the photographs also expressed the view that the "G"s in the apartment resembled those in petitioner's military notebooks (Pet. App. A8; Pet. Supp. App. SA52).[22]

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[22]Petitioner also maintains (Pet. 22-23 & n.7) that the government concealed the fact that it had destroyed the negatives of seven photographs of fingerprints taken inside the MacDonald home, which he

4. Petitioner's final claim (Pet. 26-28) is that he is entitled to a new trial on the basis of newly-discovered evidence uncovered during the post-trial investigation, particularly the statements by Stoeckley. That evidence, however, was meticulously canvassed by the trial judge (Pet. Supp. App. SA74-SA98), who concluded that it did not raise a reasonable doubt of petitioner's guilt (*id.* at SA103-SA106). Because there is an ample evidentiary basis for that finding (*id.* at SA55-SA67) and there are no extraordinary circumstances that merited intervention on appeal, the court of appeals properly sustained the district court's finding (Pet. App. A4-A5). Further review is not warranted. See, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106, 111-113 (1946).

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claims could have shown that intruders had entered it. This claim lacks merit. In the first place, during the hearing on the post-trial motions, petitioner abandoned the claim that he was prejudiced by the destruction of the fingerprint negatives. See C.A. App. 1927 n.8; I H. Tr. 23. As a result, the issue was never addressed by the courts below. In any event, the negatives were discarded because they were so badly blurred that they were of no value for purposes of identification or comparison (C.A. App. 391-392). Thus, the government's failure to apprise the defense of the existence of the negatives and of their destruction could not have adversely affected his defense.

Petitioner also argues that the government suppressed evidence that law enforcement authorities considered Stoeckley to be a valuable informant. However, petitioner was well aware of that fact, because there was testimony at trial that Stoeckley was often used by the police as an informant. See 688 F.2d at 231.

Finally, petitioner notes (Pet. 23-24) that Stoeckley admitted participating in the murders during a television interview, and he criticizes the government for objecting at trial to the introduction of her confessions. Because Stoeckley's interview did not take place until 1982, however (C.A. App. 2852), her statements during the interview could hardly have been introduced (or objected to) during petitioner's 1979 trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1985

Jeffrey R. MacDonald,
Petitioner

v.

United States of America,
Respondent

REPLY BRIEF OF PETITIONER JEFFREY R. MACDONALD

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In the
Supreme Court of the United States

October Term, 1985

No. 85-1571

Jeffrey R. MacDonald, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER JEFFREY R. MACDONALD

REPLY ARGUMENT

In light of intentional misstatements of fact contained in the Government's Brief in Opposition, Petitioner finds it necessary to file this response.

Throughout this case, the Government has willfully and deliberately misled the lower courts as to the true facts in this case, withheld evidence, and, by the response to the Petition for Writ of Certiorari to this Court, has exhibited a continuing willingness to do anything necessary to deny Petitioner a fair hearing.

1. THE RECUSAL ISSUE

The Government's allegation on page 9 of the Response that **"Proctor had no control over the investigation"** is a deliberate misstatement of fact and refuted directly by Government documents first obtained by Petitioner in 1983.

These documents, written by Proctor, acting under the color of his office as an Assistant United States Attorney on behalf of the United States Attorney for the Eastern District of North Carolina, clearly indicate that Proctor was the Assistant United States Attorney assigned to this case. He requested agents of the FBI to provide him with information in anticipation of presenting "this matter to a Grand Jury during the week of 9 November 1970."[1] In addition, Proctor sent further written requests for information to the Army on November 16, 1970. It is clear that Proctor was the assigned Assistant United States Attorney in this case, and that he was preparing this matter for trial.

Following the appointment of Judge Dupree on December 12, 1970, Proctor was shown to have met with Army investigators on December 30, 1970, and plotted with them to pressure the United States Attorney to indict Petitioner.[2] The statement on page 9 of the Government's Response that, **"Between the time of Judge Dupree's appointment and Proctor's resignation, no investigation of the MacDonald family murders was conducted by a grand jury, the United States Attorney's office, the Department of Justice, or the FBI,"** is also an intentional misstatement, directly contradicted by Government documents which were obtained by Petitioner in 1983.

This documentary proof was augmented by Proctor himself in public statements in which Proctor told the press that he was "going to Washington every two or three weeks, taking new evidence." He "talked to Victor Woerheide, Justice

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1 Letter dated November 2, 1970.

2 Transcript of telephone conversation of CID agents on December 31, 1070.

Department prosecutor, and convinced him that [he] had a case against MacDonald." [3]

Therefore, the statement that, **"Proctor resigned his position as an assistant United States Attorney on February 28, 1971, and thereafter had no connection with the case,"** directly conflicts with Proctor's public statements.

In direct contradiction to the Government's "factual" averments are (1) Proctor's statements to the Army investigators on December 30, 1970 that he was resigning the next day, and that he would surreptitiously aid them in convincing the United States Attorney to charge Petitioner; (2) the fact that Proctor actually remained in his position until February 28, 1971 (almost three months after the appointment of Judge Dupree); and (3) that Proctor told the media that, "We begged, pleaded, even threatened to resign," over the refusal of his superiors to bring a case against Petitioner.

In addition, the Government continues to withhold all of the files of the United States Attorney's office upon which Proctor had based his statement that he had prepared this case for trial, and also, the files of the FBI, Army CID, and Justice Department which would clearly detail Proctor's key role in this case.

The Government further wishes this Court to ignore the fact that although Proctor divorced Judge Dupree's daughter approximately two and a half years before the judge was assigned to the case, Proctor was still responsible for the support of the judge's grandchild.

If Proctor had, in fact, illegally provided copies of documents from the United States Attorney's office to the Army investigators as he promised to do on December 30, 1970, a full investigation might have serious ramifications for Mr. Proctor's reputation, name, and ability to support Judge Dupree's grandchild.

At no time did Petitioner limit his recusal motion. Judge Dupree, by refusing to permit another judge to hold an independent and full hearing on the Motion to Recuse as mandated by 28 U.S.C. § 144 denied Petitioner not only the

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[3] Petition for Writ of Certiorari, P. 15, n. 5.

ability to discover the full extent of Proctor's participation in this case, but also impartial factfinding as to the full extent of Judge Dupree's knowledge thereof. In effect, Judge Dupree placed his testimony upon the record, permitted no cross-examination of himself, and ruled on his own credibility and that of the father of his grandchild.

The Government's claim on page 12 of its response that, **"Proctor's involvement during this case therefore occurred well before Judge Dupree was appointed to the bench,"** again directly conflicts with documentary proof which was finally obtained by Petitioner from the Army in 1983 pursuant to numerous F.O.I.A. requests.

The Court of Appeals accepted Judge Dupree's self-serving fact finding without question and the Government expects this Court to ignore not only the documentary proof of Proctor's involvement in this case after the appointment of Judge Dupree, but also Judge Dupree's intentional disregard for the statutory mandates contained in 28 U.S.C. §§ 144 and 455.

Furthermore, the Government ignores the serious issue that neither Judge Dupree, Proctor, or any other representative of the Government disclosed to the defense Proctor's true role in this case when Judge Dupree was first assigned this matter in January of 1975, as mandated by 28 U.S.C. § 455.

This Court recently reaffirmed its concern with the issues raised by Petitioner in the case of *Aetna Life Insurance Co. v. Lavoie*, _____U.S._____, 106 S.Ct. 1580, 11585 (1986) wherein it stated:

> "More than 30 years ago, Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 624, 99 L.Ed. 942 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting, "Cannot be defined with precision."

Ibid. Nonetheless, a reasonable formulation of the issue is whether the

> "situation is one 'which would offer a possible temptation to the average judge to...lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S., ___, 60, 93 S.Ct. 57, 83 (1972)."

The continuing course of conduct by the Government in withholding and misstating evidence with regard to the recusal issue, combined with Judge Dupree's refusal to permit another judge to determine this issue, raise serious questions as to whether Petitioner even received a fair hearing on this issue, let alone a just result.

In addition, the few documents obtained by Petitioner thus far clearly show Proctor's responsibility for this case after the appointment of Judge Dupree while Proctor was married to the judge's daughter. It is also undisputed that Proctor was financially responsible for his child throughout the pendency of this case, and that Judge Dupree was the grandfather of Proctor's child.

It would be difficult to imagine a greater temptation to a judge than protecting the name and financial interest of his grandchild.

2. USE OF A GOVERNMENT INVESTIGATIVE AGENT TO FORECLOSE PETITIONER'S PSYCHIATRIC DEFENSE

The pattern which the Government established throughout this case of withholding key information from the defense prior to trial, using the fruits of their improper conduct to convict Petitioner, and then attempting to rationalize such conduct to this Court, is clearly shown by the Government's response to this issue.

There is no question that the defense was never informed prior to, or during, the trial that Dr. Brussel was, in fact, a criminologist who had been consulted by the Government in this case as early as February, 1971, and had formed a firm opinion as to Petitioner's guilt years before he

examined Petitioner during the trial.[4] This information was deliberately withheld from Petitioner by the Government. The trial court denied Petitioner access to the discovery material which would have revealed Dr. Brussel's true role in this matter and his predetermined conclusions about Petitioner.

By denying Petitioner access to this critical information concerning Dr. Brussel's status, Petitioner was not only denied an opportunity to object to the Government's use of Dr. Brussel, but also the opportunity to challenge his conclusions.

Since all of the Government psychiatric witnesses who had examined Petitioner for a full week at Walter Reed Army Hospital within months of the murders in 1970 had come to opposite conclusions of those of Dr. Brussel who "examined" Petitioner for 25 minutes nine years later, it is clear that the use of Dr. Brussel was the only way to guarantee foreclosure of the key psychiatric testimony for the defense.

The only conclusion that a fair-minded person could make was that the Government wilfully and intentionally used Brussel's sham examination to create a competing "psychiatric opinion" upon which the court relied to deny Petitioner the opportunity to present psychiatric evidence in his defense. This psychiatric testimony, including the prosecutor's experts, had been the linchpin in Dr. MacDonald's successful defense in the Article 32 proceedings.

This Court recognized "the pivotal role that psychiatry has come to play in criminal proceedings." *Ake v. Oklahoma*, ___U.S.___, 105 S.Ct. 1087, 1095 (1985). As the Court further noted: "[T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *id.* Furthermore, as in this case where mental state is an issue, "a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *id.*

Here, by the sham of a contrived psychiatric examination which was obtained by a fraud upon the defense and the court, the prosecutor gained an adversarial advantage from his intentional Sixth Amendment violation. *Massiah v. United States*, 377 U.S. 204, 207 (1964).

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[4] Petition for Writ of Certiorari, P. 18, n. 6.

As this Court stated in *Maine v. Moulton*, ___U.S.___, 106 S.Ct. 477, 484 (1985):

> "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State.....[t]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right...knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much of a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."

Here, the Government knowingly circumvented Dr. MacDonald's right to counsel by failing to disclose to Dr. MacDonald the facts of Brussel's earlier involvement and opinion. Disarmed by the Government's duplicity, Dr. MacDonald agreed to the uncounselled examination, as a result of which he was deprived of the right to present crucial psychiatric testimony in his defense.

The Government's conduct was the sort of "knowing exploitation of an opportunity to confront the accused without counsel being present" which was condemned and prohibited by this Court in *Maine v. Moulton*, *supra*.

The Government's knowing manipulation of the information necessary to Dr. MacDonald's exercise of his right to counsel was violative of his right to counsel.

3. WITHHELD, SUPPRESSED, AND DESTROYED EVIDENCE

A. Prior to trial, the Government intentionally withheld a report that one of the investigators at the crime scene had observed a half-filled syringe in the MacDonald home immediately following the murders. This information was not obtained by Petitioner until 1983. This evidence was critical to show not only the plausibility of Dr. MacDonald's version of an apparent drug-related gang committing the

murders, but would have seriously undermined the Government's arguments of a "scientifically" preserved crime scene which the jury had to accept in order to convict Petitioner.

B. All reports concerning the female boots, which were turned over to investigators by the landlord of one of the members of the Stoeckley group, were withheld from the defense prior to trial. The lower court concluded that since they were described by agents as beige in color, and Dr. MacDonald had described the boot he had seen while being attacked as brown, they did not fit the description given by Petitioner following the murders. Not only did the Government withhold the reports concerning the boots, but to this date there has never been any documentation from the Government as to what, if any, scientific tests were performed to determine if the boots could be linked to this crime.

C. Loss of human skin recovered from under the fingernail of Mrs. MacDonald: None of the doctors who examined Petitioner in the hospital following the murders noted any marks upon Dr. MacDonald's body which appeared to be human scratch marks. Nor did any of the criminal investigators of the Army or FBI make any report of any human scratches on MacDonald while he was in the hospital immediately after the incident. The Government's attempts to cover up their loss of potentially crucial evidence which might have exculpated Petitioner, and their subsequent withholding of the fact of that loss of evidence from the defense prior to trial, by saying, in effect, that since the Government lost it and Petitioner cannot prove it was exculpatory, he is not entitled to relief. The loss of the skin not only denied Petitioner the opportunity to prove through scientific testing that there were intruders in his house, but also to show the clear incompetence of the investigators in preserving important evidence.

D. Similarly, the cavalier attitude of the Government toward the withholding of notes of one of their agents that the painted letter "G" found on the wall of Helena Stoeckley's apartment resembled the "G" in the word "PIG" that had been written in blood on the headboard of the bed in the master bedroom. Not only was this fact withheld from the defense, but also the jury was thereby denied another fact which potentially linked Helena Stoeckley to the crime scene and supported Petitioner's version of events.

E. Perhaps the most important evidence withheld from the defense prior to trial was the extensive documentation verifying the reliability of Helena Stoeckley at the time she made admissions as to her involvement in this crime in 1970 and 1971. Dozens of pages of documents which were obtained by Petitioner in 1983 show clearly that Helena Stoeckley's statements were so trustworthy that they were used in many arrests and other police investigations. By withholding this important evidence from the lower court at the time of trial, the Government was able to convince the court that Helena Stoeckley was completely unreliable and her admissions with regard to this matter were withheld from the jury.

In the Government's Brief in Opposition to this Court, in 1982, opposing the Petition for Writ of Certiorari on this point, the Government cited testimony as to Stoeckley's unreliability by an agent, Brisentine, in an April 1971 report, while continuing to withhold from Petitioner and this Court the fact that dozens of pages of other investigators' reports from the same time period attested to her reliability an an "outstanding" police informant. Brief for the United States in Opposition, *Jeffrey R. MacDonald, Petitioner v. United States of America*, No. 82-565. *Cert. denied*, 459 U.S. 1103 (1983).

CONCLUSION

Not only has it been shown that the Government aggressively fought Petitioner prior to trial in his every attempt to obtain discovery in this case, but now a clear pattern of withholding potentially exculpatory evidence has become apparent.

The conduct of the Government denied Petitioner three of the major defenses he had to these heinous crimes.

First, by using Dr. Brussel's sham examination, Dr. MacDonald was denied crucial psychiatric testimony.

Secondly, by withholding evidence concerning the syringe, boots, the lost human skin found under the fingernail of Colette MacDonald, the similarities of the letter "G" found in the Stoeckley apartment and MacDonald home, and destruction of fingerprints, at the very least, Petitioner was denied the ability to show the incompetence of the

Government's hypothetical "scientific" analysis presented to the jury, and possibly the ability to prove the existence of intruders in the MacDonald home.

Thirdly, by withholding evidence of Stoeckley's reliability from both the Petitioner and the Courts, Petitioner was foreclosed from presenting to the jury the admissions of Stoeckley as to her involvement in these crimes.

In addition, at the time Judge Dupree was assigned to this case, the failure to disclose that the father of his grandchild had actively pushed for the indictment of Petitioner, demonstrates the clear pattern of intentional prosecutorial misconduct.

The Government virtually ignores the fact that Petitioner had presented after-discovered evidence through thirty-six new witnesses who identified the group originally described by Petitioner as being the murderers of his family. These witnesses offered evidence of a group of violent, drug abusing individuals who matched the description given by Petitioner immediately after the attack, and who had a motive for carrying out this attack. This group was seen going in the direction of the MacDonald residence immediately before the slayings and returning from the direction of the residence after the crimes were committed. Several of the individuals identified as being the attackers made numerous admissions as to their involvement in these crimes.

For this Court to ignore the deliberate violations of Petitioner's fundamental rights which have occurred in this case would grant license to prosecutors throughout the nation to act similarly.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 18, 1986, I served the within *Reply Brief of Petitioner* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 18, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)